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Supreme Court, U.S.
FILED

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No. 01-

IN THE

Supreme Court of the United States

RAFIDAIN BANK,

Petitioner,

v.

FIRST CITY, TEXAS-HOUSTON, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602-1611, create an exception to the sovereign immunity of an agency or instrumentality of a foreign state for the purpose of obtaining non-party discovery against said foreign state?

Does a federal district court have subject matter jurisdiction pursuant to 28 U.S.C. § 1330(a) to compel an agency or instrumentality of a foreign state to respond to a discovery subpoena, where the foreign state agency or instrumentality is not a party to the action and where there are no "claims for relief in personam" pending against it?

Does a federal district court have personal jurisdiction pursuant to 28 U.S.C. § 1330(b) to compel an agency or instrumentality of a foreign state to respond to a non-party discovery subpoena, where the party serving the subpoena deliberately attempted a method of service which was not in accordance with the "special arrangement for service" agreed to by the parties to the underlying transaction pursuant to Section 1608 of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611, but where the foreign state agency or instrumentality received actual notice of the subpoena?

PARTIES TO THE PROCEEDING

Petitioner Rafidain Bank was the appellant below. Rafidain Bank has no corporate parent and no publicly-held company owns 10% or more of Rafidain Bank's stock.

Respondent First City, Texas-Houston, N.A., was appellee below.

Defendant Central Bank of Iraq did not participate in the proceedings in the court whose judgment is sought to be reviewed.

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Appendix J — Subpoena In A Civil Case Of The United States District Court For The Southern District Of New York Dated September 14, 1998 ..... 70a

Petitioner Rafidain Bank respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this matter.

OPINIONS BELOW

The United States District Court for the Southern District of New York's Memorandum Order (Rakoff, U.S.D.J.) holding Petitioner in civil contempt is published at 68 F. Supp. 2d 377 (S.D.N.Y. 1999) and reprinted at Appendix ("App.") at 36a. The district court's Opinion and Order (Rakoff, U.S.D.J.) denying Petitioner's motion to vacate the contempt order is published at 197 F.R.D. 250 (S.D.N.Y. 2000) and reprinted at App. at 23a. The district court's Memorandum Order Staying Discovery (pending Petitioner's appeal to the court of appeals) (Rakoff, U.S.D.J.) is published at 131 F. Supp. 2d 540 (S.D.N.Y. 2001) and reprinted at App. at 16a. The Second Circuit's opinion (per Jacobs, J., joined by Meskill and Cabranes, JJ) affirming the decision of the district court is reported at 281 F.3d 48 (2d Cir. 2002) and reprinted at App. at 1a.

The original default judgment entered against Petitioner on April 26, 1991 is unpublished and reprinted at App. at 67a. The district court's Order (Martin, U.S.D.J.) denying Petitioner's motion to vacate its default is published at 1992 WL 296434 (S.D.N.Y. 1992) and is reprinted at App. at 57a. The Second Circuit's original opinion (per Walker, J., joined by Cabranes, J.), issued in Petitioner's absence, ordering "full discovery" against Petitioner on the ground that Petitioner was still a "party" to the action is reported at 150 F.3d 172 (2d Cir. 1998) and reprinted at App. at 42a. (hereinafter, "First City I")

STATEMENT OF JURISDICTION

The Second Circuit entered its opinion on February 7, 2002. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1330. Actions against foreign states.

> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.
>
> (c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state.

> (a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case

* * *

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign states; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere . . .

28 U.S.C. § 1608. Service; time to answer; default.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

* * *

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality . . .

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, managing or general agent. . . .

STATEMENT OF THE CASE

This petition, in the words of the district court, implicates "important issues concerning the duty of non-party foreign instrumentalities to supply discovery in federal litigation." *First City, Texas-Houston, N.A. v. Rafidain Bank*, 131 F. Supp. 2d at 543; App. at 21a.

In fact, because the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 ("FSIA") contains no exception from sovereign immunity for the purpose of rendering foreign states susceptible to non-party discovery, this petition raises a significant issue of first impression concerning the scope

of immunity granted to foreign states under the FSIA, and the subject matter jurisdiction of the district court pursuant to 28 U.S.C. § 1330(a) to compel non-party discovery by foreign states, or their instrumentalities.

This petition also urgently seeks review by this Court, as the federal court of last resort, to insure that the drastic remedy of civil contempt and the imposition of sanctions against an independent foreign state — and particularly, in this instance, a foreign state which has publicly been branded an enemy of the United States — has not been tainted by an attitude of hostility and partiality on the part of the Court of Appeals whose decision is sought to be reviewed herein.

This action was commenced by Respondent in November, 1990 to recover approximately $50 million in unpaid principal and interest allegedly owed by Petitioner, a commercial bank owned by the Republic of Iraq, on letters of credit issued prior to the commencement of the Gulf War. Respondent added Central Bank of Iraq ("Central Bank") as a defendant based solely on the bare allegation that Central Bank is the *alter ego* of Petitioner and therefore responsible for Petitioner's debts. Central Bank is the central banking authority of the Republic of Iraq, and plays a role analogous to the United States Federal Reserve Bank. Central Bank is not a commercial bank, and had no role in the underlying transaction. It was, and remains, the contentions of both Petitioner and Central Bank that they are separate and distinct entities, with separate and distinct functions, and that neither is the "*alter ego*" of the other. Moreover, out of respect for the fundamental principle of comity between nations, Petitioner and Central Bank are entitled to a strong threshold presumption of separateness. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983).

Initially, both defendants defaulted, and final judgment was entered against both Petitioner and Central Bank. Neither party appealed from said judgment and on April 26, 1991, the action was officially marked "Case Closed" on the district court docket sheet. A year later, Respondent and Central Bank moved to vacate their respective defaults. Central Bank's motion was granted on grounds of improper service, but Petitioner's motion was denied. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 1992 WL 296434 (S.D.N.Y. 1992) (Martin, U.S.D.J.); App. at 57a. Respondent subsequently served a new summons and complaint upon Central Bank, but not upon Petitioner.

For a period of eight years, from October, 1992, when Petitioner's motion to vacate its default was denied, until June 21, 2000, when Petitioner appeared in the district court for the purpose of moving to vacate the contempt order that is the subject of this petition, Petitioner did not appear or participate in this litigation. Given the denial of its motion to vacate its default, it was Petitioner's understanding that it was not a party to the action against Central Bank. Petitioner's understanding was shared by the district court, which stated, in explaining its declination to rule upon a motion by Respondent to compel Petitioner to respond to an earlier discovery subpoena: "since no relief had ever been granted from the default judgment previously entered against [Petitioner], the Court was under the impression that [Petitioner] was no longer in the case." *First City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. at 253; App. at 27a.

In the absence of Petitioner, Respondent proceeded to prosecute its action against Central Bank alone. Central Bank immediately moved to dismiss the newly-served Amended Complaint on grounds of sovereign immunity. In connection

with Central Bank's motion, Respondent requested, and Central Bank provided, limited discovery relating to Respondent's contention that Central Bank is the "alter ago" of Petitioner. In October 1994, Respondent served upon Central Bank's counsel an initial set of interrogatories and a Rule 34 document request jointly addressed to Central Bank and Petitioner. Although Central Bank responded to Respondent's Rule 34 demand, Petitioner did not.

Thereafter, Respondent sought supplemental responses from Central Bank. At the same time, Respondent also purported to serve a Rule 45 discovery subpoena upon Petitioner, by service on Central Bank's attorneys, who previously also represented Petitioner in its unsuccessful motion to vacate its default.[1] The fact that Respondent elected to proceed by subpoena under Rule 45, rather than moving to compel responses to its earlier Rule 34 demand, suggests that Respondent understood that Petitioner could not be compelled to provide discovery as a party to the action.

Petitioner did not respond to the Rule 45 subpoena. However, Petitioner voluntarily provided certain documents requested by Respondent, subject to the express reservation that such production would not "affect or waive any objections, defenses or immunities Rafidain has to the subpoena or its service. . . ."

In April 1996, Central Bank renewed its motion to dismiss, and Respondent separately moved to compel additional responses from Central Bank and Petitioner. Petitioner, consistent with its position that it was not a party to the action, did not respond to the motion. The district court

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1. Following the denial of Petitioner's motion to vacate the default judgment, Central Bank's counsel never again appeared in the action on behalf of Petitioner.

granted Central Bank's motion to dismiss on grounds of sovereign immunity, but, agreeing that Petitioner was not a party to the case before it, declined to address or rule upon Respondent's motion directed to Petitioner. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. at 252-53; App. at 26-27a.

The First Appeal

Respondent appealed from the district court's order granting Central Bank's motion to dismiss. Petitioner, which had never appeared in the new action, was not, and could not have been, a participant in that appeal. On July 16, 1998, the Second Circuit issued its decision in *First City I*. Despite the fact that the issues of Petitioner's "party" status, and Petitioner's immunity from discovery, were never raised, briefed, or argued either in the district court or in the briefs before the Court of Appeals, the Second Circuit opined without discussion that Petitioner was still a "party" to the action, and therefore vacated and remanded, instructing the district court to permit Respondent to conduct "full discovery" against Petitioner. *First City I*, 150 F.3d at 177; App. at 52a. As the district court later pointedly observed:

> [I] don't see how the Court of Appeals was purporting to address some subject matter jurisdiction issue that was, A, not before them, B, not presented to me, and C, may never have even been raised at any time in the district court. I'm not sure about C, but I know A and B are correct.

August 30, 1998 Transcript of Status Conference before Honorable Jed S. Rakoff, United States District Court Southern District of New York, annexed in Lodging at L-25.

The Order of Contempt

Following remand, in accordance with the Second Circuit's ruling, Respondent purported to serve a new Rule 45 subpoena on Petitioner (the "1998 Subpoena"), a broad seven-page discovery demand seeking sweeping discovery concerning the internal structure and organization of the Iraqi Ministry of Finance, as well as Petitioner and Central Bank. (Lodging at L-4). Petitioner, adhering to its position that it was not a party to the action, and was immune from the jurisdiction of the district court, did not respond to the new subpoena.[2] Accordingly, Respondent moved on November 2, 1998 to hold Petitioner in contempt. Petitioner did not appear to oppose the motion. On November 1, 1999, the district court granted Respondent's motion holding Petitioner in civil contempt and imposing a sanction of $1,000 per day, to continue until such time as Petitioner purged its default. *See First City, Texas-Houston, N.A. v. Rafidain Bank*, 68 F. Supp. 2d at 379; App. at 41a.

Petitioner's Motion to Vacate the Contempt Order

On June 21, 2000, Petitioner, represented by new counsel, appeared for the first time in this renewed action for the purpose of moving to vacate the contempt order on the grounds that the district court lacked both subject matter and personal jurisdiction to enforce the subpoena.[3]

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2. Petitioner also challenged the district court's assertion of *in personam* jurisdiction on the ground that the subpoena was not validly served. For the convenience of the Court, the facts relating to this issue are discussed separately, at pp. 9, 10.

3. Although Petitioner's counsel attempted to make a special appearance for the sole purpose of moving to vacate the contempt order, the district court, constrained by the Court of Appeals' (Cont'd)

On November 8, 2000, the district court issued its *Opinion and Order* denying Petitioner's motion. Without even addressing the merits of Petitioner's jurisdictional arguments, the district court simply held that it was constrained by the Second Circuit's decision in *First City I* that Petitioner was still a "party" to the action to deny the motion. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250, 254 (S.D.N.Y. 2000); App. at 29a.

Petitioner's Motion for a Stay Pending Appeal

Petitioner filed a timely notice of appeal from the district court's November 8th *Opinion and Order*. Thereafter, on January 11, 2001 Petitioner moved pursuant to Rule 8(a)(1), Fed. R. App. P. for an order staying discovery pending the hearing and determination of its appeal. On February 22, 2001, the district court issued its *Memorandum Order Granting Stay*, granting Petitioner's motion to stay discovery under the 1998 Subpoena pending determination of Petitioner's appeal. The district court's opinion strongly suggests that, had it not believed itself constrained by the Second Circuit's decision in *First City I*, the district court would have decided the issues on appeal in Petitioner's favor.

Specifically, the district court found that

> it is undisputed that the subpoena is valid only if Rafidain is still a party to the ongoing case against Central Bank of Iraq, a determination that was made by the Court of Appeals in Rafidain's

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(Cont'd)
determination that Petitioner is still a "party" to the action, insisted that said counsel either appear for all purposes in the action, or not at all. Left with no other choice, counsel appeared for all purposes, subject to a reservation of rights placed on the record.

> absence and that Rafidain has sought to challenge, first, by going into default, and second, by moving to vacate.

First City, Texas-Houston, N.A. v. Rafidain Bank, 131 F. Supp. 2d at 542; App. at 18-19a. The district court further found that "[i]t would therefore appear that Rafidain has, at the very least, a substantial possibility of convincing the Second Circuit that Petitioner ceased to be a party to this action in 1991 and thus was under no obligation to respond to a party subpoena." *Id.*; App. at 20a. Finally, the district court found that the public interest would be served "by preserving the status quo, allowing Rafidain to fully pursue its appeal, which . . . has the substantial possibility of implicating important issues concerning the duty of non-party foreign instrumentalities to supply discovery in federal litigation." *First City, Texas-Houston, N.A. v. Rafidain Bank*, 131 F. Supp. 2d at 543; App. at 21a.

Service of the 1998 Subpoena

As previously noted, in addition to challenging the subject matter jurisdiction of the district court, Petitioner contends that the district court lacked personal jurisdiction to compel a response to the 1998 Subpoena because it was not served in accordance with the requirements of the FSIA.

Pursuant to the underlying loan agreement, Petitioner and Respondent agreed that service in "any suit, legal action or proceeding" would be accomplished "by serving a copy thereof (by registered mail, postage prepaid) upon the Permanent Representative of Iraq to the United Nations, with headquarters . . . at the Iraq Mission. . . ."

It is undisputed that Respondent did not avail itself of this agreed-upon and simple means of service. Instead

Respondent sent a process server to intrude upon the Iraqi Mission to attempt personal service. According to the affidavit of service, on September 15, 1998, a process server entered the Iraqi Mission, attempted service upon an unidentified man who was inside the Mission, and eventually was asked to leave the premises.[4] Later that day, the subpoena was placed in an envelope, bearing only the Mission's address, and taped to the door of the Mission. In addition, a copy was mailed to Petitioner's former counsel, who had last appeared on behalf of Petitioner six years earlier. Respondent never attempted any registered mailing to the Iraqi Mission, thus, clearly never accomplishing service upon Petitioner in accordance with the "special arrangement" agreed upon by the parties.

The Decision Under Review

On appeal to the Second Circuit, Petitioner contended first, that it is not a party to the present action against Central Bank, and that, as a non-party, it is immune under 28 U.S.C. § 1330(a) and the FSIA to discovery related to the merits of Respondent's claim against Central Bank. Petitioner also challenged the personal jurisdiction of the court based upon the improper service of the subpoena. In opposition, Respondent argued that Petitioner remains a party to the action or, in the alternative, that the FSIA nonetheless grants subject matter jurisdiction to the district court to compel non-party discovery against a foreign sovereign. Conspicuously, Respondent never contended that its 1998 Subpoena was

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4. The Second Circuit's statement that Respondent first attempted service upon "an employee at the Mission" is without any foundation in the record, since the affidavit of service simply states that service was attempted upon an unidentified man inside the Mission, whose affiliation with the Mission, if any, was never established or attested to.

intended as an asset discovery subpoena in aid of execution on Petitioner's assets, which it plainly was not. Indeed, as previously noted, following Petitioner's appearance in the action in June, 2000 to vacate the contempt order, Respondent served a separate subpoena on Petitioner (the "2000 Subpoena" (Lodging at L-1)) pursuant to Rule 69, Fed. R. Civ. P., seeking precisely such asset identification discovery.[5]

On February 8, 2002, the Second Circuit issued its decision, denying Petitioner's appeal in all respects. Abandoning its prior ruling that Petitioner was subject to "full discovery" because it was a "party" to the action (although that was the only ground for the district court's decision below), the Second Circuit once again ruled against Petitioner on a ground that was not advanced by Respondent and that was not considered by the district court or briefed on appeal. Specifically, the Second Circuit now ruled that Petitioner was subject to the jurisdiction of the district court not because it is a "party," but because, according to the Second Circuit, the 1998 Subpoena was directed to discovery of Petitioner's assets in aid of execution. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d at 54; App. at 12a.

In support of its new rationale, the Second Circuit — in a mere footnote (*First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d at 54 n.3; App. at 12a) — egregiously mischaracterized the nature of Respondent's 1998 Subpoena,

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5. The district court's Opinion, dated November 8, 2000, also granted in part and denied in part a separate motion by Petitioner to vacate the 2000 Subpoena, on grounds of improper service. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250; App. at 33-35a. Although Petitioner originally appealed from the portion of the district court's Opinion denying this motion as well, Petitioner subsequently withdrew that aspect of its appeal, and it is not a subject of the Petition.

which, in fact, sought *no* documents relating to the identification of Petitioner's assets. Instead, the sole object of Respondent's 1998 subpoena was the production of a broad range of documents purportedly relating to the merits of Respondent's *alter ego* claim against a presumptively separate party — Central Bank. (Lodging at L-4). Indeed, Respondent itself repeatedly characterized the 1998 Subpoena as seeking "jurisdictional discovery" against Central Bank and never once contended that it was an asset discovery subpoena in aid of execution against Petitioner (*see* p. 19 n.7, below).

With respect to personal jurisdiction, the Court of Appeals excused Respondent's wilful failure to comply with the "special arrangement" for service of process agreed upon by the parties, holding that the FSIA does not require strict compliance with its "service technicalities," so long as the foreign state receives "actual notice." *First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d at 54-55; App. at 13-15a. In addition, the Court ruled that Petitioner waived any objection to service by not appearing more promptly to challenge the contempt order. *Id.*; App. at 14a.

REASONS FOR GRANTING THE WRIT

Petitioner comes before this Honorable Court with two strikes against it. First, it is an instrumentality of the Republic of Iraq, a foreign state with whom the United States has been in a state of armed hostilities for over a decade, and against whom, if news accounts can be believed, we may soon be at full scale war. Second, it has been held, without cause we believe, to be in contempt of the American judicial system. Why should this Court concern itself with the claims of such a petitioner?

The Petition should be granted in this case for two compelling reasons: First, the Court of Appeals has decided an important question of first impression concerning the district court's subject matter jurisdiction to compel discovery against a non-party foreign state, which has not been, but should be, settled by this Court. Indeed, the record in this case is a classic demonstration of the truth of the old adage that hard cases make bad law. In its zeal to find *some* basis upon which to permit discovery against Petitioner, the Second Circuit has made bad law on a significant issue of federal and international law, of broad applicability and importance to the foreign affairs of the United States. No federal or state court has previously sanctioned non-party discovery against a foreign state, under any circumstances. Such discovery would clearly appear to violate the strict limits established by Congress for the district court's subject matter jurisdiction over foreign states, as set forth at 28 U.S.C. § 1330(a), as well as violating accepted norms of international law. Unless overturned by this Court, the Second Circuit's decision is an open invitation to a dramatic expansion of jurisdiction by the district courts to permit intrusive discovery against foreign states for aid in litigation involving other parties. We respectfully submit that any such erosion of the principle of sovereign immunity should be left to Congress.

Second, in considering the record as a whole, it is difficult not to be concerned that the Second Circuit may have been influenced in its decisions by an obvious antipathy for the Petitioner as an agency or instrumentality of the government of Iraq. Having been denied its motion to be reinstated as a party (*i.e.*, by vacatur of its default) by the district court in 1991, Petitioner was surely reasonable in its good faith belief that it was no longer a party to this action, and for eight years the district court agreed. The Court of

Appeals' *sua sponte* (and unexplained) determination in *First City I* that Petitioner was somehow still a "party" to the action, subject to "full discovery," followed by its about face, in its decision below, where it attempts to salvage its earlier ruling on a completely different basis, suggests that the Second Circuit may have been driven more by the result it wanted to achieve then by an impartial application of the law to the circumstances of this case. This is made even more apparent by the Second Circuit's equally unprecedented holding that the "special arrangement" for service of process against a foreign state can be willfully ignored as long as the foreign state receives "actual notice." In both cases, the Second Circuit clearly exceeded the narrow scope of jurisdiction granted by Congress over foreign states in order to justify discovery against Petitioner to proceed.

Precisely because Petitioner is the instrumentality of a hostile and enormously unpopular and disfavored foreign government, we submit that this Court, as the court of last resort and the ultimate exemplar of the American legal system to the world, must be especially vigilant to insure that the principles of American law have been applied fairly and impartially to Petitioner in this case. The record, unfortunately, strongly suggests the opposite.

A. The Second Circuit Erred in Holding That The District Court Had Subject Matter Jurisdiction

It is axiomatic that, as an Article III court, the district court's subject matter jurisdiction is strictly limited to the jurisdiction granted to it by Congress. In this case, the operative statute that defines the subject matter jurisdiction of the district court over foreign states appears at 28 U.S.C. § 1330(a), which provides:

> (a) The district court shall have original jurisdiction without regard to amount in controversy of any

> nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

On its face, it is clear that the subject matter jurisdiction of the district court against foreign states is limited to "claim[s] for relief in personam" against a foreign state in a "civil action" with respect to which such foreign state is not immune. The statute provides no subject matter jurisdiction over a foreign state which is not subject to a "claim" in a pending action. Most significantly, there is nothing in the statute conferring jurisdiction on the district court to compel discovery against a non-party foreign state, which is not subject to any pending "claim."

It is clear, moreover, that the grant of subject matter jurisdiction conferred by section 1330(a) extends only to the particular "claims for relief" — as opposed to entire cases — as to which the foreign state is not immune. Thus, the fact that a district court may exercise subject matter jurisdiction over a foreign state with respect to a particular pending claim does not result in a blanket waiver of sovereign immunity by the foreign state for all purposes, or even for all other aspects of the same litigation. *See, e.g., Dar El-Bina Engineering & Contracting Co. Ltd. v. Republic of Iraq*, 79 F. Supp. 2d 374, 386 (S.D.N.Y. 2000) (Kaplan, J.).[6]

Nothing contained in the Foreign Sovereign Immunities Act itself suggests that Congress intended to broaden the grant of subject matter jurisdiction over foreign state beyond the

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6. It is noteworthy that Petitioner expressly refused to sign, and struck from the underlying loan agreement, a broader waiver of sovereign immunity for all purposes.

narrow confines of section 1330(a). On the contrary, the applicable provisions of the FSIA similarly make it clear that the limited waiver of sovereign immunity arising from the "commercial activity" of a foreign state carried on in the United States extends only to a pending "case" or "action" against such foreign state.

Section 1605(a)(2) provides in relevant part (emphasis added):

> (a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States *in any case*
>
> * * *
>
> (2) in which *the action* is based upon a commercial activity carried on in the United States by the foreign states; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere . . .

The statutory language clearly does not support an exception to sovereign immunity for purposes of permitting discovery against a foreign state in a case pending against a separate party, even another agency or instrumentality of the same foreign state.

A narrow reading of sections 1330(a) and 1605 is further supported by the language of section 1608, governing service of process under the FSIA. The operative provision, section 1608(b), provides, in relevant part (emphasis added):

> Service in the courts of the United States shall be made upon an agency or instrumentality of a foreign state:
>
> (1) by delivery of a copy of *the summons and complaint* in accordance with any special

> arrangement for service between the plaintiff and the agency or instrumentality; or
>
> (2) if no special arrangement exists, by delivery of a copy of *the summons and complaint* either to an officer, a managing or general agent . . .

Again, the service provisions of the FSIA clearly apply only in the specific instance of the commencement of an action against the foreign state. The statute does not provide for service of any form of process, other than service of a "summons and complaint." Nowhere does the statute contemplate or authorize service of a Rule 45 non-party discovery subpoena upon a foreign state. The legislative history further supports the conclusion that the only form of process against a foreign state contemplated by Congress were *pleadings*, not non-party subpoenas. As stated in the House Report:

> Section 1608 sets forth the exclusive procedures with respect to *service on, the filing of an answer or other responsive pleading by, and obtaining a default judgment* against a foreign state or its political subdivisions, agencies or instrumentalities. These provisions are intended to fill a void in existing Federal and State law, and to insure that private persons have adequate means *for commencing a suit* against a foreign state to seek redress in courts.

H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976) (emphasis added).

Finally, the narrow reading of the jurisdictional provisions of section 1330(a) and the FSIA as not extending to the issuance of non-party subpoenas against foreign states is consistent with established principles of international law.

As stated in The Restatement (Third) of Foreign Relations of the United States, sec 451:

> Discovery from a foreign state that is not a party to a proceeding has apparently not been attempted in international practice and is not provided for in either the FSIA or the corresponding laws of other states. Since sovereign immunity is the rule, and amenability to judicial process as exception, such discovery would appear to be precluded.

Restatement (Third) of Foreign Relations Laws of the United States § 451 cmf. C (1987 & 1999 Cum Annual Supp.).

In *First City I*, the Second Circuit, in apparent recognition of these strict jurisdictional limits, attempted to justify its order directing the district court to permit "full discovery" against Petitioner by simple *ipse dixit*, erroneously characterizing Petitioner as a "party" to this action, without any discussion of the basis for such characterization or its possible consequences. However, as that Court itself implicitly acknowledged by abandoning this rationale in its subsequent decision, any attempt to characterize Petitioner as a party to this action is untenable. The term "party," as defined in *Black's Law Dictionary*, and as used throughout the Federal Rules of Civil Procedure, means "in general, one having a right to control proceedings, to make defense, to adduce and cross-examine witnesses and to appeal from judgment." *Black's Law Dictionary* 1122 (6th ed. 1990). Thus, under the Federal Rules of Civil Procedure, a "party" has the right, for example, to take a deposition (Rule 30); serve discovery demands (Rules 33 and 34); and go to trial (Rules 38 and 40). Petitioner, clearly, can do none of these things. In the words of the jurisdictional statute, 28 U.S.C. § 1330(a), there are simply no longer any

"claims for relief in personam" pending against Petitioner. Respondent's "claims" against Petitioner have all been finally adjudicated and converted into a judgment.

Given a second bite at the apple, the Second Circuit has retreated from one error by committing another. Recognizing that its earlier ruling was untenable, the Second Circuit sustained the district court's subject matter jurisdiction the second time around on an entirely different basis, which was neither advanced by Respondent itself not briefed or argued at any stage of the proceedings below. The Court ruled that Petitioner's original lack of sovereign immunity, in connection with the underlying loan transaction, was "broad enough to sustain the court's jurisdiction through proceedings to aid collection of a money judgment rendered in the case, including discovery pertaining to the judgment debtor's assets." *First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d at 53-54; App. at 12a. The problem with the Second Circuit's second *sua sponte* attempt to sustain the district court's jurisdiction is that it completely misconstrues the purpose and contents of Respondent's 1998 Subpoena.

Tellingly, the Second Circuit opinion contains no discussion whatsoever of the actual contents of the 1998 Subpoena. Its entire discussion of the nature of the subpoena — the linchpin to its ruling — is confined to a footnote, in which the Court states, in purely conclusory fashion, that "contrary to Rafidain's characterization, the 1998 Subpoena . . . does seek production of evidence calculated to aid in First City's collection of its money judgment entered against Rafidain." *First City, Texas-Houston N.A. v. Rafidain Bank*, 281 F.3d at 54; App. at 12a. However, a simple perusal of the 1998 Subpoena (Lodging at L-4) demonstrates that it does no such thing. The types of documents demanded in the subpoena include such documents as "All organization charts

for the Finance Ministry, Central Bank and Rafidain" (Demand No. 1); "All corporate resolutions, minutes, and stock certificates . . . for the Finance Ministry, Central Bank, and Rafidain" (Demand No. 5); "All documents . . . concerning the authority of officers of the Finance Ministry, Central Bank and Rafidain to act on behalf of one another . . ." (Demand No. 9); "All documents concerning the authority of the Finance Ministry and/or Central Bank to determine policies of Rafidain . . ." (Demand No. 11), and the like. In the words of Respondent itself, the 1998 Subpoena sought "jurisdictional discovery" to support its *alter ego* claim against Central Bank, not discovery to aid in execution of its judgment against Petitioner.[7] Not a single demand seeks information concerning the identification or location of Petitioner's assets.

It is true that the Respondent's ultimate goal in pursuing the action against Central Bank is to collect upon the balance of the debt owed by Petitioner, by obtaining a separate money judgment against Central Bank. However, Respondent must first carry its very heavy burden of proving its bare allegation of the existence of an "alter ego" relationship between Petitioner and Central Bank, a position which has been vigorously denied by Central Bank, and which the district court itself, in the first instance, has already rejected. *First City, Texas-Houston, N.A. v. Rafidain*, 1992 WL 296434 at *6.

Such a relationship cannot merely be assumed in order to justify the discovery at issue. On the contrary, this Court, in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("Bancec"), in recognition of the international economic and political importance of

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7. *See*, Brief of Respondent to the Second Circuit at pp. 5 and 8.

government instrumentalities, and out of respect for the principle of comity between nations, established a strong threshold presumption that agencies and instrumentalities of a foreign state are legally distinct from one another and from the foreign state, stating: "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 625-28. As this Court further observed, a plaintiff bears a heavy burden to rebut the strong presumption of independence. *Id.* at 627.

Under *Bancec*, Petitioner and Central Bank are entitled to a strong presumption that they are separate and distinct parties. However, the Second Circuit's decision does just the opposite. In order to justify the district court's assertion of subject matter jurisdiction to compel discovery against Petitioner, it assumes that Petitioner and Central Bank are one and the same entity, and therefore that a subpoena ultimately intended to aid in procuring a judgment against Central Bank (not Petitioner) can be jurisdictionally defended as in aid of collection of Respondent's judgment against Petitioner. The Second Circuit's rationale patently violates this Court's holding in *Bancec* and should be overturned.

In sum, Respondent's 1998 Subpoena must be viewed for what it is: an ordinary discovery subpoena addressed to a non-party foreign state, intended to establish jurisdictional evidence against a separate entity. For the reasons stated above, this Court should grant certiorari to make it clear that such non-party discovery against a foreign state is not permitted under the FSIA.

B. The Second Circuit Erred in Holding That The District Court Had Personal Jurisdiction

Sections 1330(b) and 1608(b) carefully interconnect to create the exclusive mechanism by which a district court may acquire personal jurisdiction over an agency or instrumentality of a foreign sovereign. Specifically, section 1330(b), provides:

> Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

28 U.S.C. § 1330(b).[8]

Section 1608(b) of the FSIA, provides that service shall be made upon an agency or instrumentality of a foreign state:

> (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or
>
> (2) *if no special arrangements exist*, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

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8. Note that, under 28 U.S.C. § 1330(b), personal jurisdiction, like subject matter jurisdiction, extends only to particular "claims for relief," not to any action as a whole.

> (3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state —
>
> > (A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or
> >
> > (B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or
> >
> > (C) as directed by order of the court consistent with the law of the place where service is to be made.

28 U.S.C. § 1608(b) (emphasis added).

Section 1608 establishes a hierarchy in the permitted methods of services. *See, e.g., Finamar Investors Inc. v. Republic of Tadjikistan*, 889 F. Supp. 114 (S.D.N.Y. 1995). Recourse may not be had to the less-favored methods of service under sections 1608(b)(2) and (b)(3), except in those cases in which no "special arrangement" for service was agreed to between the parties pursuant to section 1608(b)(1). The legislative history clearly demonstrates that it was Congress' intent, by first specifying service pursuant to a special arrangement, to "encourage potential plaintiffs and foreign states to agree to a procedure on service." H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976). Thus, if a "special arrangement" for service has been agreed to by the parties, it must be strictly adhered to, and no recourse may be had to the less favored methods of service.

The Second Circuit's decision is the first of any court that extends the "substantial compliance" standard to service under section 1608(b)(1). It is clear, however, that the doctrine of "substantial compliance" or "actual notice" has no place where a specific "special arrangement" has been agreed to. Indeed, since "actual notice" could readily be achieved by any of the less-favored methods of service permitted under 1608(b)(2) or (3), to permit the doctrine of "substantial compliance" to apply in situations where a "special arrangement" has been agreed upon would utterly subvert the statutory scheme. Not surprising, therefore, none of the cases cited by the Second Circuit in support of its "substantial compliance" holding arose under section 1608(b)(1). All of the cases dealt with service under section 1608(b)(2) or (b)(3), where no "special arrangement" for service had been agreed upon by the parties in advance.

The legislative history, moreover, reveals that section 1608 was designed to "minimize the potential irritants to relations with foreign states" by providing a foreign state or its instrumentality the opportunity to agree upon a mutually-acceptable service method, thereby resulting in a nonintrusive service provision. H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976).

In this instance, Respondent's attempt at personal service, by sending a process server to knock on the door of a diplomatic mission of a nation with whom this country remains in a practical state of war, is more than a mere "technical" breach of the parties' "special arrangement." Rather, it predictably led to the very kind of hostile "irritation" that compliance with the parties' "special arrangement" was intended by Congress to avoid.

It is well established under international law that the premises of a foreign diplomatic mission are inviolable and to be protected from intrusion. Article 22 of the 1961 Vienna Convention — which predated adoption of the FSIA and was therefore unaffected by its provisions (*see* 28 U.S.C. § 1604) — provides, in relevant part, as follows:

> 1. The premises of the mission are inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

Quoting the Convention, the Second Circuit stated in *767 Third Ave. Assoc. v. Permanent Mission of the Republic of Zaire*, 988 F.2d 295 (2d Cir. 1993):

> Article 22, section 2 of the Vienna Convention goes on to note a host state's "special duty" to protect "the premises of the mission "from any intrusion or damage" and "prevent any disturbance of the peace of the mission or impairment of its dignity."

Id. at 287.

Accordingly, for the reasons stated above, this Court should grant certiorari to make clear that when a special service arrangement has been agreed upon by a foreign state in accordance with Section 1608(b)(1), a district court can only acquire personal jurisdiction over said foreign state if service is made in strict adherence to said arrangement. In such a circumstance, mere "substantial compliance," whether or not actual notice is received, is insufficient to satisfy either the Congressional purpose of section 1608(b)(1) or the strict requirements of the FSIA.

CONCLUSION

Petitioner comes before this Court because it has been found to be in contempt of the American judicial process, and sanctioned to a fine of $1,000 per day. Wherein lies Petitioner's contempt?

After initially defaulting in responding to the complaint, literally under the cloud of war, Petitioner willingly submitted itself to the American legal system and moved to vacate its default. That motion was denied. For the next eight years, Petitioner absented itself from these proceedings in the reasonable belief, shared by the district court, that it was no longer a party to this action, and therefore under no obligation — indeed, without standing — to participate. In its absence, the Second Circuit ruled in *First City I* that Petitioner was still a party to the action, and ordered it, *in abstentia*, to provide "full discovery" to assist Respondent to establish jurisdiction in its action against a presumptively separate sovereign entity.

When Respondent did appear to contest the ensuing contempt order, the district court declined to even consider its jurisdictional arguments on the merits, because it deemed itself bound by the Second Circuit's ruling that Petitioner was a party to the action. On appeal, however, the Second Circuit itself abandoned its prior rationale, which was the sole basis for the district court's decision, and upheld the contempt order on a completely new ground, that prejudged the outcome of the very action for which the subpoena was sought.

It is difficult, we submit, to consider this record as a whole without concluding that Petitioner has been treated in a manner unworthy of our legal system and unbefitting the comity and respect owed to an independent foreign state. The Second Circuit's opinion below, like its first opinion, can only be

understood as an attempt by that distinguished court, in this instance, to justify a desired result unsupported by the legal merits, in order to rule against a disfavored party. In so doing, the Second Circuit has made bad law on significant issues of first impression concerning the scope of the district court's subject matter and personal jurisdiction against foreign states.

We respectfully submit that this Court should grant certiorari to correct the Second Circuit's manifest legal errors, and, perhaps more importantly, to vindicate the paramount principle of American law that even a party as unpopular and disfavored as the Republic of Iraq can expect to be treated fairly and impartially by the Federal Courts in the application of American law to its cause.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED FEBRUARY 7, 2002

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2001

(Argued: September 17, 2001 Decided: February 7, 2002)

Docket No. 00-9556

FIRST CITY, TEXAS-HOUSTON, N.A.,

Plaintiff-Appellee,

- v. -

RAFIDAIN BANK,

Defendant-Appellant,

CENTRAL BANK OF IRAQ,

Defendant.

Before: MESKILL, JACOBS, CABRANES, *Circuit Judges*

* * *

Appendix A

DENNIS JACOBS, *Circuit Judge.*

In this litigation commenced under the Foreign Sovereign Immunities Act ("FSIA") of 1976, 28 U.S.C. § 1602, *et seq.* (1994), plaintiff First City, Texas-Houston, N.A. ("First City") holds an unsatisfied default judgment against Rafidain Bank ("Rafidain"), and seeks to collect that judgment from Central Bank of Iraq ("Central Bank") on the theory that Central Bank is Rafidain's alter ego. Rafidain appeals an order of the United States District Court for the Southern District of New York (Rakoff, J.), refusing to vacate an order of civil contempt that had been entered to compel Rafidain's compliance with discovery demands directed to the alter ego question. Rafidain appeals the order on the grounds that (1) the district court lacks personal jurisdiction and (2) that subject matter jurisdiction is lacking because, even if the FSIA afforded jurisdiction in the underlying litigation involving a loan agreement and letters of credit, Rafidain is no longer a party to that action and there is no alternative jurisdictional basis for compelling Rafidain to submit to non-party discovery in the United States.

We affirm, without deciding whether Rafidain is or has been a "party," on the ground that because jurisdiction under the FSIA existed to decide the underlying litigation involving a loan agreement and letters of credit, the FSIA continues to confer jurisdiction for proceedings in aid of that money judgment.

We also affirm the district court's ruling that in serving certain discovery notices, First City effected personal service on Rafidain.

Appendix A

BACKGROUND

In 1990, First City filed suit against Rafidain and Central Bank, as Rafidain's alter ego, to recover more than $50 million in unpaid principal and interest on defaulted letters of credit issued by Rafidain, Iraq's state-owned commercial bank. The district court (Martin, J.) entered default judgment for $53.2 million against both defendants on April 26, 1991. A year later, both defendants moved to vacate the defaults; Central Bank's motion was granted on the basis that service had been insufficient, but Rafidain's motion was denied. *See First City, Texas-Houston, N.A. v. Rafidain*, No. 90 Civ. 7360, 1992 WL 296434 (S.D.N.Y. Oct. 6, 1992). First City subsequently served Central Bank (for the second time) with the summons and an amended complaint, thereby commencing a new action against Central Bank. Central Bank moved to dismiss the amended complaint on grounds of sovereign immunity.

In connection with Central Bank's motion to dismiss, First City requested discovery on its contention that Central Bank is the "alter ego" of Rafidain, and served both banks with interrogatories and document requests bearing on that issue. Central Bank provided some responses in February 1995, and some more in April 1996, but has yet to fully comply. Rafidain did not respond at all. In July 1995, First City issued and served a subpoena and a set of document requests on Iraq's Permanent Representative to the United Nations in New York, as Rafidain's registered agent. Rafidain did not respond to the subpoena.

In June 1996, Central Bank renewed its motion to dismiss on several grounds, including lack of jurisdiction.

First City opposed the motion on the ground that it had been hamstrung in gathering evidence by the banks' non-compliance, and separately filed a motion to compel additional responses. At the hearing on the motion to dismiss, the district court (Rakoff, J.) granted Central Bank's motion to dismiss with prejudice on grounds of sovereign immunity, without expressly deciding First City's motion to compel. First City appealed.

On July 16, 1998, this Court remanded with the following instructions:

> Because Rafidain is a party to this suit, has been found to fit within the FSIA's "commercial activity" exception and because First City has a judgment against Rafidain, allowing First City to seek further discovery from Rafidain would not intrude upon the sovereign immunity, if any, of Rafidain. The district court should have permitted full discovery against Rafidain, which would have allowed First City a fair opportunity to conduct jurisdictional discovery without further impinging on [Central Bank's] immunity. Following discovery from Rafidain, the district court would then have been in a better position to assess whether discovery from [Central Bank] on the alter ego question was sufficiently likely to be productive as to warrant compelling additional jurisdictional discovery. We believe that the court's failure to take such a course, when coupled with the dismissal of the complaint, was an abuse of discretion.

> Accordingly, the district court's order granting [Central Bank's] motion to dismiss is vacated. On remand, the district court is instructed to permit First City to conduct full discovery against Rafidain. After such discovery, the district court should then determine (1) whether there is an adequate factual record on which to rule whether [Central Bank] was Rafidain's alter ego, or (2) whether further discovery against [Central Bank] on the jurisdictional question is warranted.

First City, Texas-Houston, N.A. v. Rafidain Bank, 150 F.3d 172, 177 (2d Cir. 1998) (internal citation omitted).

After the remand, First City served Rafidain with a Rule 45 subpoena duces tecum seeking jurisdictional discovery on the "alter ego" issue (the "1998 Subpoena"). Rafidain, which argues that it was no longer a party to this action and was not subject to the court's jurisdiction, did not respond to the 1998 Subpoena. On November 2, 1998, First City moved to hold Rafidain in contempt. First City also moved to compel Central Bank to respond to discovery on the ground that First City had been unable to obtain discovery from Rafidain. Concurrently, Central Bank renewed its motion to dismiss for lack of jurisdiction. The district court did not order Central Bank to comply with jurisdictional discovery, but denied Central Bank's motion to dismiss because "Rafidain may yet seek to purge its civil contempt and provide the requested discovery" that could support plaintiff's 'alter ego' theory. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 68 F. Supp.2d 377, 380 (S.D.N.Y. 1999).

First City's motion for contempt was granted, and an Order to Show Cause against Rafidain was entered on November 19, 1998. *Id.* at 379. Rafidain did not appear or respond. Almost a year later, on November 1, 1999, the district court held Rafidain in civil contempt and imposed a fine of $1,000 per day, to continue until such time as Rafidain purged its default. *Id.* On another front, First City served a subpoena in December 1999 seeking "alter ego" documents from Richards & O'Neil, counsel for Central Bank and previous counsel of record for Rafidain. *First City Texas-Houston, N.A. v. Rafidain Bank, et al.*, 197 F.R.D. 250, 253 (S.D.N.Y. 2000).

Rafidain at last appeared (with new counsel) on June 21, 2000 — more than seven months after the Contempt Order had been entered against it, and for the first time since the action was recommenced against Central Bank — and moved to vacate the civil contempt order on the grounds that the district court lacked subject matter jurisdiction and personal jurisdiction to enforce the subpoena. Rafidain took no steps to purge its contempt.

Two days later, First City responded by serving a subpoena duces tecum on Rafidain's counsel seeking, pursuant to Fed. R. Civ. P. 69, post-judgment discovery from Rafidain and restraint of assets in aid of enforcing the default judgment against Rafidain (the "2000 Subpoena"). *Id.* Rafidain moved to quash this subpoena on the ground of improper service, which motion was denied. *Id.* at 255-56.[1]

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1. Rafidain does not appeal from that ruling.

Appendix A

On November 8, 2000, the district court denied Rafidain's motion to vacate the contempt order, in part on the ground that it was constrained by this Court's ruling that Rafidain remained a party to the action. *See First City*, 150 F.3d at 177. The denial was framed as follows:

> In moving to vacate the Court's order of November 1, 1999 holding Rafidain in civil contempt for failure to comply with the 1998 Rafidain Subpoena, Rafidain argues, first and foremost, that the Court lacked authority to impose such an order because Rafidain by that time was no longer a party to this lawsuit and was exempt under the FSIA from being subject to third-party discovery. The first premise of the argument is effectively foreclosed, however, by the Court of Appeal's [sic] express finding that "Rafidain is a party to this suit" and that "the district court is instructed to permit First City to conduct full discovery against Rafidain." While Rafidain was not a party to the appeal in which the Court of Appeals made these determinations and therefore may have a basis in some future appeal for asking the Court of Appeals to reconsider its conclusions in this regard, it would exceed the power of this lower court to disregard these clear and unequivocal determinations of the Court of Appeals. The Court therefore finds, in compliance with the Second Circuit's ruling, that Rafidain remains a party to this action. As a result, moreover, Rafidain's additional argument about the limitations of

> jurisdiction over non-party sovereign entities is rendered irrelevant, since Rafidain is not a non-party.

First City, 197 F.R.D. at 254 (internal citation omitted). The district court also ruled that service of the 1998 Subpoena was sufficient, denied Rafidain's motion to quash it, and ordered that discovery "should proceed promptly." *Id.* at 254, 256.

Rafidain now appeals the denial of its motion to vacate the civil contempt order entered for failure to comply with the 1998 Subpoena, and moves to stay all discovery pending appeal. The district court granted the motion for a stay with respect to the 1998 Subpoena, but denied it with respect to the Rule 69 2000 Subpoena seeking the post-judgment discovery. *First City, Texas-Houston, N.A. v. Rafidain Bank, et al.*, 131 F. Supp.2d 540, 542-43 (S.D.N.Y. 2001). Rafidain has not yet produced any post-judgment discovery or paid any of the 1991 judgment.[2]

DISCUSSION

On appeal, Rafidain argues that it is no longer a party to this action and that the district court therefore lacks subject matter jurisdiction under the FSIA to compel Rafidain to provide evidence or discovery. Alternatively, Rafidain argues that the court lacks personal jurisdiction over it. First City contends that Rafidain's appeal is untimely and that this Court therefore lacks jurisdiction to hear this appeal; alternatively,

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2. First City has collected $55 million in compensation from the U.S. Government. *See First City*, 68 F. Supp.2d at 378.

First City argues that the district court has both subject matter and personal jurisdiction over Rafidain.

We conclude that Rafidain's appeal is timely and is properly before us, that personal jurisdiction has been obtained over Rafidain, and that subject matter jurisdiction exists because Rafidain's waiver of sovereign immunity for the purposes of First City's law suit against it continues through post-judgment discovery and collection of the money judgment, which includes discovery on the "alter ego" issue. We therefore affirm the order of the district court denying Rafidain's motion to vacate and quash. We need not decide whether Rafidain is still a "party" to the action.

I

First City challenges appellate jurisdiction on the ground that Rafidain's appeal from the denial of its motion to vacate the contempt order is in the nature of an untimely appeal of the contempt order itself, entered on November 1, 1999, from which no appeal was taken.

We disagree. The district court's order denying Rafidain's motion to vacate is immediately appealable under the "collateral order" doctrine. *See First City*, 131 F. Supp.2d at 542. First City did not challenge Rafidain's motion to vacate on the ground that it was untimely raised, and we decline to consider the argument. *See Kraebel v. New York City Dep't of Hous. Preservation and Dev.*, 959 F.2d 395, 401 (2d Cir. 1992) ("We have repeatedly held that if an argument has not been raised before the district court, we will not consider it."). The district court proceeded to

entertain the motion, and entered an order that was appealable and that was timely appealed. We need not consider whether we *would have had* appellate jurisdiction if the district court had rejected Rafidain's motion to vacate as untimely and if Rafidain's present appeal were from such a ruling.

II

Rafidain argues that it is no longer a party to this action and that the district court therefore lacks jurisdiction under the FSIA to compel Rafidain to provide discovery. Rafidain also argues that the district court lacks personal jurisdiction over it. We conclude that the district court has both subject matter jurisdiction over this action and personal jurisdiction over Rafidain.

A. Subject Matter Jurisdiction

Rafidain does not contest that it was a party to the lawsuit that resulted in entry of the default judgment against it. The court's subject matter jurisdiction in that case was based on the FSIA, 28 U.S.C. § 1602 *et seq.*, which provides the sole source of jurisdiction of a court in the United States over a foreign state and its agencies. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610-11 (1992).

As a general matter, a foreign state and its agencies (such as Rafidain) enjoy sovereign immunity:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be

> immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604. The exception to sovereign immunity applicable in this case is the "commercial activities" exception, set forth in 28 U.S.C. § 1605:

> (a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States *in any case*
>
> * * *
>
> (2) in which *the action* is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere. . . .

(emphases added). Rafidain, having participated in commercial banking transactions in the United States, submitted itself to the jurisdiction of the United States courts, as well as to the procedures and legal responsibilities associated with such jurisdiction, to the extent those procedures and responsibilities are related to its commercial activities in the United States. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992); *Texas Trading & Mill. Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981). Rafidain does not contest that it waived immunity under the "commercial activities" exception.

Given Rafidain's waiver, the district court had subject matter jurisdiction under 28 U.S.C. §§ 1330(a) and 1605(a)(2) to decide the controversy that arose from Rafidain's commercial activities carried on in the United States. The waiver by a foreign state under section 1605(a)(2), rendering it a party to an action, is broad enough to sustain the court's jurisdiction through proceedings to aid collection of a money judgment rendered in the case, including discovery pertaining to the judgment debtor's assets. Otherwise, the FSIA would in some cases confer jurisdiction to do no more than render an unenforceable, permanently unsatisfied judgment. No doubt, courts should proceed with care in pursuing the assets of foreign governments and their instrumentalities, and in dealing with such allegations as fraudulent transfers. But Rafidain is challenging the court's subject matter jurisdiction, not its discretion. We think that where subject matter jurisdiction under the FSIA exists to decide a case, jurisdiction continues long enough to allow proceedings in aid of any money judgment that is rendered in the case. In this case, that includes discovery regarding a possible alter ego of Rafidain that may have assets sufficient to satisfy First City's judgment.[3]

Discovery of a judgment debtor's assets is conducted routinely under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 69(a) ("In aid of the judgment or execution, the judgment creditor or a successor in interest when that

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3. Contrary to Rafidain's characterization, the 1998 Subpoena (issued pursuant to Fed. R. Civ. P. 45) does seek production of evidence calculated to aid First City's collection on the money judgment entered against Rafidain. *See* 1998 Subpoena, Joint App. at 212-219.

interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held."); *see also Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.*, 999 F.2d 314, 317 (8th Cir. 1993) ("[T]he remedies of a judgment creditor include the ability to question the judgment debtor about the nature and location of assets that might satisfy the judgment."); *Minpeco v. Hunt*, No. 81-CV- 7619, 1989 WL 57704, at *1 (S.D.N.Y. May 24, 1989) (quoting *National Service Industries, Inc. v. Vafla Corp.*, 694 F.2d 246, 250 (11th Cir. 1982)) ("A judgment creditor is entitled to discover the identity and location of any of the judgment debtor's assets, wherever located."); *Caisson Corp. v. County West Bldg. Corp.*, 62 F.R.D. 331, 334 (E.D. Pa. 1974) ("[Under Rule 69(a),] the judgment creditor must be given the freedom to make a broad inquiry to discover hidden or concealed assets of the judgment debtor."). Subject matter jurisdiction was therefore obtained.

B. Personal Jurisdiction

The order of contempt was entered to compel Rafidain's compliance with the 1998 Subpoena; Rafidain argues that it was never properly served with it. We conclude that service of the 1998 Subpoena was sufficient to effect personal service under the FSIA, regardless of whether Rafidain was or was not a "party" to the action at the time service was made.

The FSIA, 28 U.S.C. § 1330(b), provides: "Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have [subject matter]

jurisdiction under subsection (a) where service has been made under section 1608 of this title." In turn, section 1608(b)(1) provides that service of process upon an agency or instrumentality of a foreign state may be made "by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality." *See Texas Trading*, 647 F.2d at 308 (holding that under the FSIA, personal jurisdiction equals subject matter jurisdiction plus valid service of process).

Paragraph six of the agreement between Rafidain and First City expressly provides that Rafidain "consents to process being served in any suit, legal action or proceeding in the New York and federal courts sitting in New York, New York, by serving a copy thereof (by registered mail, postage prepaid) upon the Permanent Representative of Iraq to the United Nations, with offices at the date hereof at the Iraq Mission, 14 E. 79 Street, New York, New York 10021. . . ."

For the reasons stated by the district court, the 1998 Subpoena was properly served on Rafidain. *See First City*, 197 F.R.D. at 254-55. First, Rafidain waived any objection to the manner of service because it does not claim lack of actual notice, yet it failed to appear or challenge the contempt order or service of the subpoena until more than eleven months after the contempt order was entered and twenty-one months after the subpoena had been served. *Id.* at 254. Second, Rafidain does not allege that it was unaware of this Court's decision dated July 16, 1998, stating that Rafidain was a party and that it must provide discovery of the sort sought in the 1998 Subpoena. *Id.* at 254-55. Third, service was valid under the Federal Rules of Civil Procedure and

the Loan Agreement. *Id.* at 255. After First City's attempt to serve the 1998 Subpoena on an employee at the Iraq Mission was foiled by an employee at the Mission, the process server attached the subpoena to the door of the Mission in an addressed envelope, and sent another copy to Rafidain's then-counsel of record. Although compliance with the service requirements may not have been exact, they were substantial and sufficient. *See Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344, 1352 (11th Cir. 1982) ("The failure to follow precisely those steps in § 1608 designed to insure that actual service be made should not override and invalidate the fact that in this case notice was actually received."); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 821 (3d Cir. 1981) ("Rather than making service of foreign instrumentalities a rigid, technical, or cumbersome procedure, Congress . . . wished to insure that the sovereign owner would receive actual notice."); *Banco Metropolitano v. Desarrollo de Autopistas y Carreteras de Guatemala*, 616 F. Supp. 301, 304 (S.D.N.Y. 1985) ("Given the nature of the . . . problems intended to be addressed by the FSIA, strict enforcement of its technicalities here would be inappropriate."). Personal jurisdiction was therefore obtained.

CONCLUSION

For the reasons set forth herein, we affirm the district court's denial of Rafidain's motion to vacate the civil contempt order entered for Rafidain's failure to comply with the 1998 Subpoena.

APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 7360 (JSR)

FIRST CITY, TEXAS-HOUSTON, N.A.,

Plaintiff,

v.

RAFIDAIN BANK and CENTRAL BANK OF IRAQ,

Defendants.

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

The long and somewhat tortured history of this case has been elaborated previously and full familiarity therewith is here assumed. *See, e.g., First City v. Rafidain Bank*, 150 F.3d 172 (2d Cir. 1998); *First City v. Rafidain Bank*, 197 F.R.D. 250 (S.D.N.Y. 2000). Relevant for present purposes is the fact that after the Court of Appeals had ruled that plaintiff First City, Texas-Houston, N.A. ("First City") could take full discovery from defendant Rafidain Bank ("Rafidain") in support of its theory that co-defendant Central Bank of Iraq ("CBI") was Rafidain's "alter ego," First City served Rafidain with a subpoena duces tecum et ad testificandum dated

September 14, 1998 (the "1998 Subpoena") seeking support for its theory. When no response was forthcoming from Rafidain, this Court entered an Order dated November 1, 1999 (the "Contempt Order") holding Rafidain in civil contempt and ordering it to pay $1,000 per day until it purged its contempt. On June 21, 2000, after a long absence from this litigation, Rafidain, through new counsel, the law firm of Sinnreich, Wasserman & Grubin, LLP ("SW&G"), appeared and moved to vacate the Contempt Order and quash the 1998 Subpoena on the ground that Rafidain was not properly a party before the Court at the time the 1998 Subpoena issued. While that motion was pending, First City served SW&G, as counsel for Rafidain, with a second subpoena duces tecum dated June 23, 2000 (the "2000 Subpoena"), seeking financial information in aid of its default judgment against Rafidain. *See* Rule 69, Fed. R. Civ. P. In response, Rafidain moved to quash the 2000 Subpoena.

By Opinion and Order dated November 8, 2000 (the "Opinion and Order"), the Court denied in its entirety Rafidain's motion directed toward the 1998 Subpoena and denied in part Rafidain's motion directed toward the 2000 Subpoena. After filing appeals therefrom in the Court of Appeals, Rafidain moved this Court "for an Order pursuant to Rule 8(a)(1) of the Federal Rules of Appellate Procedure staying all discovery against Rafidain pending the hearing and determination of Rafidain's appeal from [the Opinion and Order]." *See* Rafidain's Notice of Motion, dated Jan. 11, 2001. It is this latest motion that the Court here resolves.

Before determining whether a stay pending appeal is appropriate, the Court must first satisfy itself that the

underlying orders are appealable. With respect to the portion of the Order and Opinion that denied Rafidain's motion to quash the 2000 Subpoena and directed compliance with that subpoena, it is well settled that orders compelling discovery are generally not appealable, even under the so-called "collateral order" doctrine. *See, e.g., Am. Express Warehousing, Inc. v. Transamerica Ins. Co.*, 380 F.2d 277, 280 (2d Cir. 1967). Rafidain's argument that its status as a foreign sovereign somehow justifies interlocutory appeal in regard to the 2000 Subpoena is misplaced, as this Court long ago found that Rafidain falls under the "commercial activity" exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a), *see First City*, 1992 WL 296434, at *3 (S.D.N.Y. Oct. 6, 1992), and Rafidain no longer challenges that conclusion. In choosing to participate in U.S. commercial banking transactions, Rafidain also chose, in effect, to submit itself to the jurisdiction and procedures of United States courts and the legal responsibilities entailed therewith, to the extent they related to such commercial activities. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). Whatever the merits of Rafidain's claim that it is no longer a party to this case (*see infra*), there is no doubt that it was a party to the original default judgment entered against it and therefore is, at a minimum, a judgment-debtor. Under any analysis, therefore, the 2000 Subpoena was a valid discovery request, and if, as Rafidain claims, there is a defect in regard to the manner of service, the rejection of such an objection is insufficient in itself to form the basis for an interlocutory appeal.

With respect to the 1998 Subpoena, by contrast, it is undisputed that the subpoena is valid only if Rafidain is still

a party to the ongoing case against CBI, a determination that was made by the Court of Appeals in Rafidain's absence and that Rafidain has sought to challenge, first, by going into contempt and, second, by moving to vacate. The denial of Rafidain's motion to vacate the Contempt Order (1) conclusively determined Rafidain's obligation to proceed with the discovery sought by First City through the 1998 Subpoena, (2) resolved an issue wholly separate from the merits of First City's claims against CBI (the only claims remaining in the case), and (3) would be effectively unreviewable on appeal from any final judgment against CBI. Thus all elements of the "collateral order" doctrine are satisfied and the portion of the Order and Opinion refusing to vacate the contempt order would appear immediately appealable. *See Cohen v. Beneficial Indus. Loan. Corp.*, 337 U.S. 541, 546-47 (1949); *Ellis v. Israel*, 12 F.3d 21, 23 (2d Cir. 1993); *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 882 F.2d 682, 685 (2d Cir. 1989).

While First City argues that such an appeal is foreclosed because Rafidain neither took a timely appeal from the Contempt Order itself nor filed its motion to vacate in timely fashion, no objection was made to the filing of the motion to vacate on timeliness grounds and the appeal was timely filed after denial of that motion. Moreover, a civil contempt order that adds an additional $1,000 fine each day is in the nature of a continuing order that a party may ask the Court to exercise its plenary powers to reconsider at any time. *See LoRusso v. United States*, 695 F.2d 45, 53 (2d Cir. 1982). Accordingly, the Court concludes that its Order denying Rafidain's motion to vacate the 1998 Subpoena is appealable.

Appendix B

Turning, then, to the question of whether a stay of the discovery sought by the 1998 Subpoena is appropriate, the Court must assess: "(1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated a 'substantial possibility, although less than a likelihood, of success' on appeal, and (4) the public interests that may be affected." *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994) (quoting *Hirschfield v. Bd. of Elections*, 984 F.2d 35 (2d Cir. 1993). Considering these factors, the Court concludes that a stay is warranted in this instance.

The central issue on appeal is whether Rafidain remains a party to this action following the entry of default judgment against both it and CBI in 1991. Although this Court, per Judge Martin, eventually vacated the default judgment as to CBI, it refused vacatur to Rafidain. *See First City v. Rafidain Bank*, 1992 WL 296434 (S.D.N.Y. Oct. 6, 1992). It would therefore appear that Rafidain has, at the very least, a substantial possibility of convincing the Second Circuit that Rafidain ceased to be a party to this action in 1991 and thus was under no obligation to respond to a party subpoena. Indeed, the stated reason that this Court denied Rafidain's motion to vacate was simply that it was bound by the conclusion of the Second Circuit that "Rafidain is a party to this suit." *First City*, 150 F.3d at 177; *see* Opinion and Order, at 8. The Court of Appeals, by contrast, is free to reconsider the matter, and, given that Rafidain was not a party to the appeal that produced this conclusion and that the issue of Rafidain's non-party status was not before the Court of Appeals, it may well do so.

Appendix B

The Court further concludes that Rafidain will suffer irreparable harm unless a stay of the discovery sought by the 1998 Subpoenas is granted, since it will then be obligated, in order to purge its contempt, to provide the very discovery it argues it has no obligation to produce. On the other hand, it does not appear that First City would suffer a substantial harm if a stay was granted, both in view of the fact that the Court of Appeals has already scheduled a prompt hearing on the appeal and in light of the fact that the United States Government, as part of certain arrangements following the Gulf War, has already reimbursed First City approximately $55 million for the losses it suffered as a result of defendants' default. Although this compensation perhaps does not make First City whole, it is nearly $ 2 million more than the default judgment awarded by this Court against Rafidain and certainly lessens the financial harm that would flow from any further delay in First City's attempts to recoup its losses through litigation. Finally, the Court finds that the public interest here is served by preserving the status quo, allowing Rafidain to fully pursue its appeal, which, as indicated above, has the substantial possibility of implicating important issues concerning the duty of non-party foreign instrumentalities to supply discovery in federal litigation.

Accordingly, the Court hereby grants Rafidain's motion for a stay of the discovery sought by the 1998 Subpoenas and, concomitantly, continues the suspension of penalties under the Contempt Order that it initially ordered on December 11, 2000 in a telephonic conference with the parties. As to discovery sought by the 2000 Subpoena, however, the stay is denied.

Appendix B

SO ORDERED.

s/ Jed S. Rakoff
JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
February 22, 2001

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED NOVEMBER 8, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 7360 (JSR)

FIRST CITY, TEXAS-HOUSTON, N.A.,

Plaintiff,

v.

RAFIDAIN BANK and CENTRAL BANK OF IRAQ,

Defendants.

OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.

The uneven course of this case has taken some further odd turns. Previously the Court had held defendant Rafidain Bank ("Rafidain") in civil contempt for failure to provide plaintiff First City, Texas-Houston, N.A. ("First City") with discovery sought in connection with First City's claim that co-defendant Central Bank of Iraq ("Central Bank") was the "alter ego" of Rafidain (a commercial bank) and therefore not entitled to sovereign immunity. While waiting in vain for Rafidain to purge its contempt, First City sought similar discovery from another source by serving a subpoena duces

tecum on the law firm Richards & O'Neil, LLP, present counsel to Central Bank but former counsel to Rafidain. Richards & O'Neil moved to quash the subpoena, but before that motion could be finally resolved, Rafidain, which had effectively absented itself from these proceedings for many years, reappeared through new counsel, Sinnreich, Wasserman & Grubin, LLP ("SW&G"), and moved to vacate the contempt order. First City responded by serving on SW&G, as Rafidain's agent, both a subpoena duces tecum seeking Rafidain-related financial information and a restraining notice seeking to restrain certain of Rafidain's assets. In turn, Rafidain, through SW&G moved to vacate both the subpoena and the restraining notice. Because all these motions bear upon each other, the Court discusses and resolves them collectively in the instant Opinion and Order.

The pertinent facts, already the subject of several prior opinions of this Court,[1] and the Court of Appeals,[2] are summarized as follows. In February 1989, First City, an American bank, agreed to loan nearly $50 million to Rafidain, a commercial bank wholly owned by the Republic of Iraq. In August 1990, after Iraq, in connection with the Kuwaiti War, repudiated its foreign debts, Rafidain defaulted on repayment of the loan. First City then commenced this suit against defendants Rafidain and Central Bank, arguing

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1. *See, e.g., First City, Texas-Houston, N.A. v. Rafidain Bank*, 68 F.Supp.2d 377, 378-79 (S.D.N.Y. 1999); *First City, Texas-Houston, N.A. v. Rafidain Bank*, 1992 WL 296434 (S.D.N.Y. Oct. 6, 1992).

2. *See First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 173-75 (2d Cir. 1998).

that as "alter egos of each other" both were liable on the loan. Complaint, ¶ 3.[3] Neither defendant appeared or answered, and on April 26, 1991 the Court (per Martin, J.) entered a default judgment against Rafidain in the amount of approximately $53.2 million and a declaratory judgment against both defendants declaring that the approximately $21.4 million in the bank accounts that Rafidain and Central Bank held with First City could be set off against the Rafidain default judgment. This Order was a final judgment, from which no appeal was taken by either party.

A year later, however, on April 24, 1992, both defendants moved before Judge Martin to set aside the judgment on grounds of improper service, sovereign immunity, and excusable neglect. Finding that the service on Central Bank had been improper, Judge Martin vacated the judgment as to Central Bank, but denied any relief as to Rafidain. *See First City, Texas-Houston, N.A. v. Rafidain Bank*, 1992 WL 296434 (S.D.N.Y. Oct. 6, 1992). No appeal was taken by Rafidain from this denial, and, indeed, Rafidain effectively abandoned the litigation from that point until this year.

Meanwhile, First City, finding itself unable to satisfy its judgment against Rafidain, sought reimbursement from the United States Government (pursuant to certain arrangements arising from the Kuwaiti War) and succeeded in recovering $55 million. Nevertheless, because of interest and other charges, this recovery did not fully make First City whole. In early 1994, First City re-served Central Bank with the Amended Complaint in this case, and this time service was

3. Plaintiffs filed an Amended Complaint on December 18, 1990 but the essential allegations did not change.

proper. In response, Central Bank moved to dismiss on the ground of sovereign immunity (a ground raised, but not reached, in connection with Judge Martin's earlier order). As previously, First City countered by arguing that, so far as the underlying transactions here in issue were concerned, Central Bank had acted, not as a branch of a sovereign government, but as the "alter ego" of Rafidain, which, as Judge Martin had previously determined, was a commercial bank that fell outside the protections of sovereign immunity. *See* Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a). In support of this "alter ego" theory, First City requested, and Judge Martin granted, certain limited discovery, pursuant to which First City propounded discovery requests to both Central Bank and Rafidain. Only Central Bank responded, however, and so, on May 11, 1996, First City filed a motion seeking to compel responses from Rafidain, as well as broader discovery from Central Bank. Central Bank, for its part, renewed its motion to dismiss on the ground of sovereign immunity.

With these motions pending, the case was reassigned from Judge Martin to Judge Jones and, thereafter, in early 1997, to the undersigned. On March 27, 1997, the Court, after hearing oral argument, denied First City's motion for broader discovery from Central Bank, and granted Central Bank's motion to dismiss on the ground of sovereign immunity, finding that First City had failed to make an adequate showing that Central Bank was the alter ego of Rafidain. *See* transcript of hearing of Mar. 26, 1997, at 20-23. As no one appeared on behalf of Rafidain, the Court took no action on First City's motion to compel discovery from Rafidain. Indeed, since no relief had ever been granted from the default judgment

previously entered against Rafidain, the Court was under the impression that Rafidain was no longer in the case. Accordingly, the Court simply entered judgment dismissing Central Bank. *See* Judgment, Mar. 31, 1997.

On appeal from that judgment, however, the Court of Appeals reversed, holding that the District Court should not have rejected First City's alter ego theory without first permitting First City to "conduct full discovery against Rafidain" on the question of whether Central Bank was Rafidain's alter ego. Unlike the limited discovery permitted against Central Bank, such full discovery was justified against Rafidain, the Court of Appeals held, "[b]ecause Rafidain is a party to this suit, has been found to fit within the FSIA's 'commercial activity' exception and because First City has a judgment against Rafidain. . . ." *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 177 (2d Cir. 1998).

Following remand, First City served on Rafidain (in the contested manner described below) a subpoena duces tecum et testificandum dated September 14, 1998 (the "1998 Rafidain Subpoena") seeking both documentary and testimonial evidence on the "alter ego" issue. Receiving no response from Rafidain, First City asked the Court to hold Rafidain in civil contempt and impose a sanction of $1,000 per day to continue until such time as Rafidain purged its contempt. Despite being given ample opportunities to respond — extending over nearly a year — Rafidain chose not to do so. Accordingly, on November 1, 1999, the Court granted First City's motion and held Rafidain in civil contempt. *See First City, Texas-Houston, N.A. v. Rafidain Bank*, 68 F.Supp.2d 377, 379 (S.D.N.Y. 1999).

Meanwhile, First City, effectively rebuffed in its efforts to obtain discovery from Rafidain on the issue of whether Central Bank was the "alter ego" of Rafidain, sought to explore alternative sources of discovery. First, it claimed that it was now entitled to broader discovery from Central Bank than had previously been permitted, but this application was denied by the Court as overly intrusive and contrary to the Court of Appeal's prescription that discovery from a presumptively sovereign entity like Central Bank should be limited and circumspect. *Id.* at 379; *see First City*, 150 F.3d at 176.[4] Next, First City served a subpoena duces tecum on Richards & O'Neil, claiming that, notwithstanding its role as counsel to Central Bank, Richards & O'Neil had, either as a result of its former representation of Rafidain or otherwise, come into possession of nonprivileged materials obtained from Rafidain that would bear on the alter ego question. An initial subpoena — patently overbroad — was voluntarily withdrawn by First City at the suggestion of the Court, but First City then served a second subpoena duces tecum on Richards & O'Neil (the "Richards & O'Neil Subpoena") that remains outstanding. Richards & O'Neil responded with a motion to quash.

Shortly thereafter — mirabile dictu — Rafidain, through new counsel SW&G, suddenly appeared on June 21, 2000 and moved to vacate the contempt order against it. First City responded by serving upon SW&G, as agent for Rafidain,

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4. Central Bank, for its part, renewed its original motion for dismissal on the basis of sovereign immunity, but the Court denied the motion, without prejudice, on the ground that Rafidain might yet seek to purge its contempt and provide discovery that could support plaintiff's "alter ego" theory. *See First City*, 68 F. Supp. 2d at 380.

a subpoena duces tecum and restraining notice dated June 23, 2000 (the "2000 Rafidain Subpoena and Restraint") seeking, pursuant to Rule 69, Fed. R. Civ. P., post-judgment discovery and restraint of assets in aid of enforcing the default judgment previously entered against Rafidain. Rafidain, in turn, moved to vacate the 2000 Rafidain Subpoena and Restraint on the ground of improper service.

Presently pending before the Court, therefore, are (i) Rafidain's motion to vacate the contempt order and quash the 1998 Rafidain Subpoena; (ii) Richards & O'Neil's motion to quash the Richards & O'Neil Subpoena; and (iii) Rafidain's motion to vacate the 2000 Rafidain Subpoena and Restraint. The Court considers each in turn:

(i) *Rafidain's Motion to Vacate the Contempt Order And Quash the 1998 Rafidain Subpoena.*

In moving to vacate the Court's order of November 1, 1999 holding Rafidain in civil contempt for failure to comply with the 1998 Rafidain Subpoena, Rafidain argues, first and foremost, that the Court lacked authority to impose such an order because Rafidain by that time was no long a party to this lawsuit and was exempt under the FSIA from being subject to third-party discovery. The first premise of the argument is effectively foreclosed, however, by the Court of Appeal's express finding that "Rafidain is a party to this suit" and that "the district court is instructed to permit First City to conduct full discovery against Rafidain." *First City*, 150 F.3d at 177. While Rafidain was not a party to the appeal in which the Court of Appeals made these determinations and therefore may have a basis in some future appeal for

asking the Court of Appeals to reconsider its conclusions in this regard, it would exceed the power of this lower court to disregard these clear and unequivocal determinations of the Court of Appeals. The Court therefore finds, in compliance with the Second Circuit's ruling, that Rafidain remains a party to this action. As a result, moreover, Rafidain's additional argument about the limitations of jurisdiction over non-party sovereign entities is rendered irrelevant, since Rafidain is not a non-party.

Rafidain's fallback argument is that service of the 1998 Rafidain Subpoena was improper and ineffective. As indicated in the Rider to that subpoena, it was purportedly served pursuant to Federal Rule of Civil Procedure 45 and/or to Section 6 of the Loan Agreement between the parties. *See* Rider to 1998 Rafidain Subpoena, Affidavit of Jonathan Sinnreich, Esq. ("Sinnreich Aff."), sworn to June 24, 2000, Ex. E. Rafidain argues that service was ineffective under either prong. But the argument fails, for three reasons.

First, Rafidain does not claim that it lacked actual notice of the 1998 Rafidain Subpoena at the time served or that it lacked actual notice of the repeated opportunities this Court afforded Rafidain to appear and challenge the subpoena before being held in contempt. Yet it neither appeared nor challenged either the contempt order or service of the subpoena until nearly a year after the contempt order had issued and more than 21 months after Rafidain learned that the subpoena had been served. In these circumstances, Rafidain has waived any objection to the manner of service. *Cf. Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 61 (2nd Cir. 1999).

Second, Rafidain does not claim that it lacked actual knowledge of the Court of Appeals' decision in this case, dated July 16, 1998, which determined that Rafidain was a party to this preceding and must provide full discovery to First City of the kind generally sought by the 1998 Rafidain Subpoena. As a party, Rafidain was subject to providing such discovery pursuant to Rules 26 through 37 of the Federal Rules of Civil Procedure. Service of the 1998 Rafidain Subpoena — which, among other things, was served on the only law firm that had ever appeared for Rafidain up to that time, *i.e.* Richards & O'Neil — more than met the requirements of service on a party. See Rule 5(b), Fed. R. Civ. P. (authorizing service upon attorneys for represented parties by means of either personal delivery or mail).[5] Under these circumstances, Rafidain had to know, notwithstanding the language of the Rider invoking Rule 45, Fed. R. Civ. P., that it was being noticed as a party to produce the discovery ordered by the Court of Appeals, and its disregard of this notice constituted civil contempt.

Third, in any event, the service was valid under Rule 45 and the Loan Agreement. The latter provides that Rafidain Bank "irrevocably appoints" the Iraqi Permanent Representative

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5. While a Rule 45 subpoena is typically used to obtain the production of documents and/or testimony from a non-party to an action (whereas Rules 26-37 provide simpler means for obtaining the same from a party), nothing in the Federal Rules of Civil Procedure explicitly precludes the use of Rule 45 subpoenas against parties. *See, e.g., Badman v. Stark*, 139 F.R.D. 601, 603 (M.D. Pa. 1991) ("Rule 34 applies only to parties to the lawsuit, while a subpoena under Rule 45 may be served upon both party and non-party witnesses.").

in New York as its agent to accept service of process. Rafidain's process server attempted to serve the 1998 Rafidain Subpoena on an employee at the Iraqi Mission but was rebuffed, after which he attached the subpoena to the door of the Mission, in an addressed envelope, and mailed another copy to Rafidain's only counsel of record at the time, the law firm of Richards & O'Neil. *See* Sinnreich Aff., Ex. E; First City's Response to Rafidain's Motion to Vacate Contempt Order, at 8. This was sufficient in the circumstances to comply with Rule 45, *see, e.g., Cordius Trust v. Kummerfield*, 2000 WL 10268, at *1 (S.D.N.Y. 2000); *Hinds v. Bodie*, 1988 WL 33123, at *1 (E.D.N.Y. 1988), especially since, as noted, Rafidain does not deny that it received timely actual notice of the subpoena, *see First Nationwide Bank v. Shur*, 184 B.R. 640, 642 (E.D.N.Y. 1995); *King v. Crown Plastering Corp.*, 170 F.R.D. 355, 356 (E.D.N.Y. 1997).[6]

(ii) *Richards & O'Neil's Motion to Quash the Richards & O'Neil Subpoena.*

The decision of the Court of Appeals directed the district court to first permit full discovery against Rafidain and only "after such discovery" was completed to then determine "whether further discovery against Central Bank on the

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6. While Rafidain also attacks the failure of First City to tender witness fees along with the subpoena, the Court concludes that the appropriate remedy in these circumstances is not to quash the subpoena in its entirety but simply to modify its scope by eliminating the requests for testimony (the only part of the subpoena to which the witness fees relate), without prejudice to First City's subsequently seeking testimony through future notices. *See, e.g., Northrop Corporation v. McDonnell Douglas Corp.*, 751 F.2d 395, 403 (D.C. Cir. 1984).

jurisdictional question is warranted." *First City*, 150 F.3d at 177. Accordingly, discovery of any documents that Richards & O'Neil holds in its capacity as Central Bank's attorney or agent is, at a minimum, premature and the Richards & O'Neil Subpoena must be quashed to the extent it seeks such materials.

By contrast, discovery must be permitted of those relevant materials that Richards & O'Neil received in connection with its prior representation of Rafidain, except as such materials are protected by privilege or work product. Based on the affirmations of Richards & O'Neil as to the nature, scope, and timing of its prior representation of Rafidain, such production will be limited to materials dated no earlier than 1985 and no later than 1990, which, unless subject to claims of privilege or work product must be produced to First City's counsel by December 1, 2000. If claims of privilege or work product are asserted with respect to any such materials, a corresponding privilege list must be furnished to the Court and First City's counsel by no later than December 15, 2000 and the materials therein listed must by that date be furnished to the Court in chambers for its *in camera* inspection.

(iii) *Rafidain's Motion to Vacate the 2000 Rafidain Subpoena And Restraint.*

Rafidain objects to the 2000 Rafidain Subpoena and Restraint on the ground of improper service. This objection, however, must be considered in light of the fact that, as indicated above, Rafidain remains a party to this action and Rafidain's new counsel, SW&G, has entered a general appearance in this case for all purposes. *See* Affidavit of

Jonathan Sinnreich, Esq., dated "June" (actually July) 7, 2000, at ¶ 3; transcript of hearing of June 26, 2000, at pages 4-6. These facts are significant because Rule 5(b) of the Federal Rules of Civil Procedures requires that "[whenever] . . . service is required or permitted to be made upon a party represented by an attorney the service *shall* be made upon the attorney unless service upon the party is ordered by the Court" (emphasis added). Moreover, Rule 5(b) authorizes such service to be made either by "delivering a copy to the attorney" or "by mailing it to the attorney."

With respect to the subpoena portion of the 2000 Rafidain Subpoena and Restraint, First City properly sought post-judgment discovery under Rule 69, Fed. R. Civ. P., which provides that such discovery may be obtained "in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held." Thus when Rule 69 discovery is sought from a party represented by an attorney, service may proceed either under Rule 5(b) of the Federal Rules of Civil Procedure or under the rules of service established in the relevant state. Here, it is undisputed that First City mailed the 2000 Rafidain Subpoena and Restraint to the offices of SW&G by overnight delivery. *See* Memorandum of Law in Support of Motion to Vacate Plaintiff's Subpoena Duces Tecum and Restraining Notice, at 15. First City thus clearly availed itself of the Rule 5(b) method of service. The Court therefore concludes that service of the subpoena portion of the 2000 Rafidain Subpoena and Restraint was proper. Since Rafidain has not made any objection to the subpoena requests themselves (as opposed to the manner in which the subpoena was served), the Court finds that such discovery should proceed promptly.

Appendix C

As for the Restraining Notice served along with the 2000 Rafidain Subpoena, Rafidain argues that it must be vacated under § 1610(c) of the FSIA, which provides: "No attachment or execution [upon a foreign sovereign or instrumentality] . . . shall be permitted until the court has ordered such attachment and execution. . . ." 28 U.S.C. § 1610(c). First City concedes that it failed to seek such a court order before serving the Restraining Notice. *See* First City's Response to Rafidain's Motion to Vacate Subpoena and Restraining Order, at 4. Consequently, the Restraining Notice must be vacated, but without prejudice to its being renewed upon appropriate motion to the Court.

In sum, the Court hereby (a) denies Rafidain's motion to vacate the contempt order against it and to quash the 1998 Rafidain Subpoena; (b) grants in part and denies in part the motion of Richards & O'Neil to quash the Richards & O'Neil Subpoena; and (c) grants in part and denies in part Rafidain's motion to vacate the 2000 Rafidain Subpoena and Restraint.

SO ORDERED.

s/ Jed S. Rakoff
JED S. RAKOFF, U.S.D.J

Dated: New York, New York
November 8, 2000

APPENDIX D — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED NOVEMBER 1, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 7360 (JSR)

FIRST CITY, TEXAS-HOUSTON, N.A.,

Plaintiff,

v.

RAFIDAIN BANK and CENTRAL BANK OF IRAQ,

Defendants.

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

In February 1989, plaintiff First City, Texas-Houston, N.A. ("First City")[1] extended $49.9 million in credit to defendant Rafidain Bank, a commercial bank wholly owned by the Republic of Iraq. Pursuant to a repayment agreement,

1. First City was declared insolvent in 1992, and this suit has been prosecuted by various successors-in-interest. *See First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 174 n.1 (2d Cir. 1998); Powers Aff. Ex. F. (Shreve Aff.) ¶¶ 2-3. For convenience, however, the Court will continue to use the "First City" denomination that appears in the prior papers and proceedings herein.

Appendix D

Rafidain Bank made some initial payments to First City; but in or around August 1990, as one of the outgrowths of the Kuwaiti War, Iraq repudiated its foreign debts, and thereafter Rafidain Bank ceased any further repayment of its debt to First City. First City then brought this lawsuit, seeking to recover on the unpaid debt. In an amended complaint filed on December 18, 1990, First City also sought recovery from co-defendant Central Bank of Iraq ("CBI") on the theory that CBI was effectively the "alter ego" of Rafidain Bank. In April 1991, default judgment in the amount of $53.2 million was entered against both defendants, jointly and severally. While no portion of this was collected from the defendants and interest continued to accumulate, First City thereafter received $55 million in compensation from the United States Government. *See* Powers Aff., Ex. C.

Meanwhile, in April 1992, the judgment against CBI was vacated for lack of valid service. In early 1994, First City effected proper service on CBI and the suit against CBI was reinstated. CBI then moved to dismiss on grounds of sovereign immunity. In opposition to that motion and in support of its theory that CBI was Rafidain Bank's alter ego, First City sought discovery from both defendants. While CBI provided the limited discovery ordered from it by the Court, Rafidain Bank, against which the original default judgment continued, failed to respond.

In March 1997, the Court granted CBI's motion to dismiss, finding that First City had failed to support its alter ego theory. In July 1998, however, the Court of Appeals reversed, concluding that the district court should not have dismissed CBI without permitting First City further opportunity

to conduct "full discovery against Rafidain" on the alter ego issue. *See First City*, 150 F.3d at 177. Upon remand, First City renewed its discovery demands on Rafidain Bank and served subpoenas duces tecum seeking relevant information. Consistent with its prior conduct, Rafidain Bank ignored the subpoenas, failed to provide any discovery, and failed to appear at the conferences convened by the Court to address discovery. *See* Transcript of Hearing ("Tr."), August 31, 1998; Tr., November 9, 1998.

First City then moved, by Order to Show Cause dated November 19, 1998, to hold Rafidain in contempt of Court and to impose a fine of $1,000 for each day that Rafidain remained in contempt. Predictably, Rafidain Bank failed to appear on the return date, November 30, 1998.

Nonetheless, the Court, in an excess of caution, has waited nearly a year for Rafidain Bank to proffer an excuse for its noncompliance or to give even a hint of its willingness to provide the ordered discovery. No such response having been received, the Court now hereby holds Rafidain Bank in civil contempt and assesses a fine of $1,000 per day, plus interest, at the federal statutory rate, for each day beginning November 1, 1999 that Rafidain Bank fails to cure the contempt.

The Court of Appeals further directed that on remand, after permitting discovery from Rafidain Bank, "the district court should then determine (1) whether there is an adequate factual record on which to rule whether CBI was Rafidain's alter ego, or (2) whether further discovery against CBI on the jurisdictional question is warranted." *First City*, 150 F.3d

at 177. In light of Rafidain's recalcitrance, and the parties' assessment that no order of contempt was likely to compel further discovery from Rafidain, the parties chose, even while First City's contempt motion was pending, to proceed to this next stage, with First City seeking to compel further discovery from CBI and CBI renewing its motion to dismiss on grounds of sovereign immunity.

As to the former, the Court, although assuming that no discovery will be forthcoming from Rafidain Bank,[2] sees no reason to disturb its prior finding — which it hereby adopts by reference, *see* Tr., March 26, 1997 — that First City has failed to make a sufficient showing to warrant further discovery from CBI. *See First City*, 150 F.3d at 176; *see generally Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1332 (2d Cir. 1990); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992). In effect, First City seeks to obtain from an arm of the Iraqi Government, CBI, the broad discovery it has failed to obtain from a commercial (albeit state-owned) entity, Rafidain Bank, in order to justify invasion of CBI's presumptive sovereign immunity on the theory that, appearances notwithstanding, CBI is really the alter ego of Rafidain Bank. Such bootstrapping, if permitted, would make a mockery of the mandate of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603, not to intrude upon a foreign government's sovereignty in any but very limited respects. For example, First City asks this Court to compel CBI to utilize CBI's own powers under Iraqi law to obtain from Rafidain Bank and then

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2. Indeed, the Court assumed as much when it made its prior ruling (though failing to make this clear on the record), since even then Rafidain Bank had blatantly ignored all discovery requests from First City.

turn over to First City documents that, First City speculates, will help establish the alter ego hypothesis. Such compulsion would be a far greater intrusion on CBI's presumptive sovereign immunity than anything remotely contemplated by the Court of Appeals. *See First City*, 150 F.3d at 176; *see also Filus*, 907 F.2d at 1332; *Arriba*, 962 at 534.[3]

As to CBI's motion to dismiss, the Court, in the absence of any further evidence, would ordinarily feel compelled to grant CBI's motion, again essentially for the reasons stated at the time of the prior dismissal. *See* Tr., March 26, 1997. While First City argues that the Court should draw an adverse inference unfavorable to CBI from Rafidain Bank's failure to provide discovery on the alter ego issue, to do so would be to assume the very point in controversy, *i.e.*, that CBI is an alter ego of Rafidain Bank. Yet it is the very absence of meaningful evidence of that alleged relationship that underlay the Court's original grant of the motion to dismiss. *Id.* Rafidain Bank, on its face, is a state-owned commercial bank. CBI, on its face, is roughly the Iraqi equivalent of the Federal Reserve. Nothing in the defendants' ostensible relationship nor in anything adduced by First City provides a sufficient basis to infer that CBI is really Rafidain Bank's alter ego.

Nonetheless, because of the possibilities, exceedingly remote though they be, that Rafidain Bank may yet seek to

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3. Equitable considerations also disfavor such further intrusion. Although the successors-in-interest to First City presumably purchased the Rafidain Bank's debt to First City at a discount, they have obtained not only a $53.2 million judgment against Rafidain Bank but also the $55 million in actual compensation from the United States Government.

purge its civil contempt and provide the requested discovery and that such discovery may cast further light on the alter ego issue, the Court, in an excess of caution, will for now deny CBI's motion, without prejudice to its being renewed six months from the date hereof.

Accordingly, First City's motion to hold defendant Rafidain Bank in civil contempt is hereby granted, First City's motion to compel further discovery from defendant CBI is hereby denied, and CBI's motion to dismiss is hereby denied without prejudice to its being renewed six months hereafter.

SO ORDERED.

s/ Jed S. Rakoff
JED S. RAKOFF, U.S.D.J

Dated: New York, New York
November 1, 1999

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED JULY 16, 1998, FILED JULY 17, 1998

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 1997

(Argued: December 12, 1997 Decided: July 16, 1998)

Docket No. 97-7532

FIRST CITY, TEXAS-HOUSTON, N.A.,

Plaintiff-Appellant,

- v. -

RAFIDAIN BANK and CENTRAL BANK OF IRAQ,

Defendants-Appellees.

Before: WALKER and CABRANES, *Circuit Judges*.[1]

Appeal from a judgment of the United States District Court for the Southern District of New York (Jed S. Rakoff, *District Judge*), dismissing plaintiff-appellant First City, Texas-Houston, N.A.'s complaint against defendant-appellee, Central Bank of Iraq, for lack of subject matter jurisdiction.

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1. The Hon. Frank X. Altimari attended oral argument in this case, but did not participate in consideration of the appeal. *See* Local Rule § 0.14(b).

Appendix E

Vacated and Remanded.

* * *

WALKER, *Circuit Judge*:

Plaintiff-appellant First City, Texas-Houston, N.A. ("First City")[2] appeals from a judgment dated March 31, 1997, entered in the United States District Court for the Southern District of New York (Jed S. Rakoff, *District Judge*), granting defendant-appellee Central Bank of Iraq's ("CBI") motion to dismiss First City's complaint. First City argues that the district court erroneously denied its request for additional discovery relating to CBI's alleged control over its co-defendant Rafidain Bank ("Rafidain"), also of Iraq, thereby preventing First City from proving that jurisdiction exists over CBI. We agree, and therefore vacate the dismissal of the complaint and remand for further proceedings.

Background

This action followed Iraq's repudiation of its foreign debts following its invasion of Kuwait in August 1990. One of the affected transactions was a February 1989 loan agreement (the "Agreement") between Rafidain and First City whereby First City purchased approximately $49.9 million worth of drafts drawn under letters of credit issued by Rafidain. Rafidain paid First City in accordance with the Agreement until Iraq repudiated its foreign debts.

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2. Texas Commerce Bank N.A. is the successor-in-interest to First City, Texas-Houston, N.A.'s April 1991 judgment against Rafidain Bank; however, this opinion refers to the appellant as "First City."

Appendix E

Rafidain is a commercial bank wholly owned by the Republic of Iraq. CBI is the central banking authority in Iraq, and its functions are roughly analogous to those of the Federal Reserve Bank in the United States. According to First City, CBI oversees all of Rafidain's foreign transactions. It is undisputed that both Rafidain and CBI are "agenc[ies] or instrumentalit[ies] of a foreign state" under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1603. Although foreign states and their instrumentalities generally enjoy sovereign immunity from suit, no such immunity applies where these entities engage in certain commercial activities set forth in the FSIA. *See* 28 U.S.C. § 1605(a).

On November 15, 1990, First City filed suit in the United States District Court for the Southern District of New York (John S. Martin, *District Judge*) to recover funds owed under the Agreement. It filed an amended complaint on December 18, 1990, and served a copy of the summons and the amended complaint on both Rafidain and CBI through the Iraqi Permanent Representative to the United Nations. After both defendants failed to appear or to answer the complaint, the district court entered a default judgment on April 26, 1991 in the amount of approximately $53.2 million against them.

In April 1992, Rafidain and CBI moved for relief from the default judgment. CBI asserted that it was never served with the amended complaint. By order dated September 28, 1992, the district court vacated the default judgment against CBI and granted First City a reasonable time to serve process. By the same order, the court denied Rafidain's motion to vacate the default judgment, finding that Rafidain had been properly served and fell within the FSIA's commercial activity exception. First City served CBI in early 1994.

Appendix E

In August 1994, CBI moved to dismiss the complaint, *inter alia*, for lack of subject matter jurisdiction under the FSIA. CBI argued that, as an instrumentality of Iraq, it was immune from suit in federal court, *see* 28 U.S.C. § 1604, and that it did not fit within any of the FSIA's exceptions to statutory immunity, *see* 28 U.S.C. §§ 1605-07. In particular, CBI contended that § 1605's commercial activity exception did not apply because CBI did not engage in any act or activity either in the United States or elsewhere with a direct effect in the United States.

First City did not dispute that CBI is a foreign instrumentality that does not fit within an FSIA exception to sovereign immunity. Rather, First City contended that CBI was effectively Rafidain's "alter ego," which, if true, would subject CBI to jurisdiction under the FSIA's commercial activity exception to immunity to the same extent as Rafidain. Before ruling on the motion to dismiss, the district court permitted First City to pursue limited discovery from the defendants on its alter ego theory.

In October 1994, First City served its first set of interrogatories and document requests on CBI and Rafidain. First City sought various organizational documents from both parties relevant to the possible existence of an alter ego relationship. CBI responded and later supplemented its response. After Rafidain refused to respond to the initial request, First City served a subpoena and a second set of document requests on Rafidain. First City maintains that Rafidain has consistently refused to provide the bulk of the requested information. On May 11, 1996, First City filed a motion pursuant to Fed. R. Civ. P. 37 that sought an order

compelling CBI and Rafidain to supplement their responses to First City's document requests and interrogatories.

Following delays while the case was reassigned, the district court scheduled briefing on CBI's motion to dismiss. After oral argument, the district court granted CBI's motion to dismiss on March 28, 1997, without directly addressing First City's unresolved motion to compel discovery from the defendants. The district court granted the motion to dismiss reluctantly in a ruling from the bench and suggested that it would have permitted additional discovery if CBI were a domestic corporation:

> If this were simply a question of two domestic entities, the court would be inclined to permit further discovery because the prejudice to the defendant in such a situation . . . would be modest, but in the court's view the sovereign immunity comes into play and other policies come to bear that the court thinks have to be given very substantial weight.

The district court's view of the matter was summarized as follows:

> [T]he sensible way the law ought to treat an alterego allegation in a sovereign immunity situation is to require that without having to put the sovereign to the intrusiveness of discovery, that the plaintiff come forward after an appropriate 12(b)(1) motion has been made with meaningful evidence to support the alterego allegation.

Appendix E

Upon reviewing the evidence proffered by First City to support its alter ego claim against CBI, the district court, concluding that "the evidence that the plaintiffs have thus far adduced and which the record in this hearing will reflect is insufficient to support an alter ego claim," dismissed the complaint against CBI for lack of jurisdiction. First City now appeals from that dismissal.

Discussion

First City argues that the district court erred by granting CBI's motion to dismiss for lack of jurisdiction without allowing First City the opportunity to conduct additional jurisdictional discovery. Implicitly conceding that its showing of jurisdiction over CBI was wanting, First City's appeal focuses on the court's refusal to grant discovery, rather than on the merits of CBI's motion to dismiss. For the reasons set forth below, we hold that the district court abused its discretion by denying First City additional discovery.

I. *Standard of Review*

Although we review *de novo* the dismissal of a complaint for lack of subject matter jurisdiction under the FSIA, *see Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1016-17 (2d Cir. 1991), our primary inquiry here is whether the district court erred by granting CBI's motion to dismiss before allowing First City to conduct additional jurisdictional discovery. The parties disagree over the standard this court should apply in reviewing the district court's decision to deny discovery. Defendants urge us to review the district court's ruling for an abuse of discretion. *See, e.g., M.B. v. Reish*,

119 F.3d 230, 232 (2d Cir. 1997). In contrast, relying upon *Garrett v. City of San Francisco*, 818 F.2d 1515 (9th Cir. 1987), First City maintains that, because the district court ignored its motion to compel, we should review the district court's decision *de novo*. We agree with defendants that abuse of discretion review is appropriate in this case.

First City's reliance on *Garrett* to support its argument for heightened review is misplaced. In *Garrett*, the district court failed to address the merits of the plaintiff's motion to compel before granting the defendant's motion for summary judgment. The Ninth Circuit reversed, concluding that because the district court did not exercise its discretion — by failing to consider the motion to compel discovery — "the issue of whether or not it should have [exercised its discretion] present[ed] a legal question which [was] subject to *de novo* review." *Id.* at 1518 n.3. Unlike the district court in *Garrett*, the district court here did consider First City's motion for discovery and discussed at length its reasons for denying additional discovery. In evaluating the motion to dismiss, the district court weighed the benefits of additional discovery against the intrusiveness to CBI of permitting such discovery. Accordingly, the district court implicitly denied First City's motion to compel. *Cf. Columbia Pictures Indus. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1532-33 (9th Cir. 1991) (distinguishing *Garrett* because district court "implicitly ruled that the materials sought in discovery would not defeat [defendant's] motion for summary judgment"), *aff'd*, 508 U.S. 49 (1993). Thus, we will review the district court's denial of additional discovery for an abuse of its discretion.

Appendix E

II. *Jurisdictional Discovery Against Sovereigns*

The FSIA provides the "sole basis" for obtaining jurisdiction over foreign states and their instrumentalities in the United States. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Foreign states are immune from jurisdiction in United States courts unless one of the FSIA's exceptions to immunity applies. *See* 28 U.S.C. §§ 1604-07. Rafidain was found to fall within the "commercial activity" exception, which provides that sovereigns will not be immune from jurisdiction in any case

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]

28 U.S.C. § 1605(a)(2).

First City admits that no act or activity of CBI, qua CBI, was carried on or performed either in the United States or elsewhere with a direct effect in the United States. However, First City contends that CBI is nonetheless subject to the commercial activity exception because Rafidain is CBI's alter ego, and CBI oversees Rafidain's commercial banking activities in the United States.

Appendix E

The Supreme Court first applied the alter ego doctrine in the context of the FSIA in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"). In *Bancec*, the Court explained that foreign entities are presumed to be separate; however, that presumption may be overcome in two situations: (1) when "a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created," and (2) when treating the entities separately "would work fraud or injustice." *Id.* at 629 (quotation marks omitted).

It is undisputed that CBI is an agency of Iraq. Therefore, CBI is immune from suit by First City unless First City can set forth facts showing that CBI's alleged control over Rafidain is sufficient to attribute Rafidain's acts or activities to CBI under the alter ego theory. First City requested additional discovery against CBI and Rafidain to prove that CBI extensively controls Rafidain. Although the district court permitted some discovery against CBI and Rafidain, First City contends that the district court erroneously denied additional discovery and failed to rule on its motion to compel before granting CBI's motion to dismiss. First City maintains that without conducting additional discovery, it was unprepared to oppose CBI's motion.

In determining whether First City should be allowed additional discovery, the district court properly considered the comity concerns implicated by allowing jurisdictional discovery from a foreign sovereign. Such considerations require a delicate balancing "between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's

legitimate claim to immunity from discovery." *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992). In *Arriba*, the Fifth Circuit recommended that "discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination." *Id.*

Applying a similarly "circumspect" approach, we have explained "that generally a plaintiff may be allowed limited discovery with respect to the jurisdictional issue; but until she has shown a reasonable basis for assuming jurisdiction, she is not entitled to any other discovery." *Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1332 (2d Cir. 1990). CBI argues that First City received all of the jurisdictional discovery required by *Filus* and still has failed to present a reasonable basis for the district court to assume jurisdiction over it. CBI therefore contends that any further discovery would violate the principles of comity underlying the FSIA. By contrast, First City maintains that a foreign sovereign should not be allowed to provide minimal, incomplete responses to jurisdictional discovery and then hide behind the FSIA to shield itself from jurisdiction in the United States.

Although the district court had in mind the appropriate considerations in addressing the question of discovery from a foreign sovereign, we believe that it abused its discretion by focusing exclusively on CBI's immunity and failing to recognize that these comity concerns do not apply to Rafidain. The court already had subject matter jurisdiction over Rafidain. The district court had refused to vacate the default judgment against Rafidain and had found the bank to be squarely within the commercial activity exception to

sovereign immunity. The record indicates that Rafidain provided incomplete responses to First City's document requests and interrogatories. First City's motion to compel sought information from Rafidain that could have revealed whether there was merit to its allegation that CBI extensively controls Rafidain. Because Rafidain is a party to this suit, has been found to fit within the FSIA's "commercial activity" exception and because First City has a judgment against Rafidain, allowing First City to seek further discovery from Rafidain would not intrude upon the sovereign immunity, if any, of Rafidain. The district court should have permitted full discovery against Rafidain, which would have allowed First City a fair opportunity to conduct jurisdictional discovery without further impinging on CBI's immunity. Following discovery from Rafidain, the district court would then have been in a better position to assess whether discovery from CBI on the alter ego question was sufficiently likely to be productive as to warrant compelling additional jurisdictional discovery. *See Filus*, 907 F.2d at 1332. We believe that the court's failure to take such a course, when coupled with the dismissal of the complaint, was an abuse of discretion.

Accordingly, the district court's order granting CBI's motion to dismiss is vacated. On remand, the district court is instructed to permit First City to conduct full discovery against Rafidain. After such discovery, the district court should then determine (1) whether there is an adequate factual record on which to rule whether CBI was Rafidain's alter ego, or (2) whether further discovery against CBI on the jurisdictional question is warranted.

Appendix E

Conclusion

The district court's order dismissing the complaint against CBI is vacated, and the case is remanded for further proceedings consistent with this opinion. Each party shall pay its own costs.

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 16th day of July, one thousand nine hundred and ninety-eight.

BEFORE: Hon. John M. Walker, Jr.
Hon. José A. Cabranes
Circuit Judges*

Docket No. 97-7532

FIRST CITY, TEXAS-HOUSTON, N.A.,

Plaintiff-Appellant,

-v-

RAFIDAIN BANK and CENTRAL BANK OF IRAQ,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

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* The Honorable Frank X. Altimari attended oral argument in this case, but did not participate in consideration of the appeal. See Local Rule § 014(b)

Appendix E

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, and DECREED that the judgment of said district court be and it hereby is vacated and the case is remanded to said district court for further proceedings in accordance with the opinion of this court. Each party shall bear its own costs.

FOR THE COURT
Carolyn Clark Campbell, Clerk
By: s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

APPENDIX F — TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 31, 1998

[omitted here but submitted separately as Lodging]

APPENDIX G — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED SEPTEMBER 28, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 7360 (JSM)

FIRST CITY, TEXAS-HOUSTON, N.A.,

Plaintiff

- - against - -

RAFIDAIN BANK and CENTRAL BANK OF IRAQ,

Defendants.

MEMORANDUM ORDER

JOHN S. MARTIN, JR., District Judge

On April 26, 1991, this Court entered a default judgment against the Defendants Central Bank of Iraq ("Central Bank") and Rafidain Bank. Defendants now move pursuant to Fed. R. Civ. P. 60(b) for relief from that default judgment.

FACTUAL BACKGROUND

In February 1989, Rafidain Bank entered into a $50 million loan agreement with Plaintiff First City, Texas-Houston, N.A. ("First City"). Pursuant to that agreement,

First City purchased $49.9 million worth of drafts drawn under letters of credit issued by Rafidain Bank, and Rafidain Bank began making payments as prescribed by the agreement. Following the invasion of Kuwait, Iraq repudiated its foreign debts. Soon thereafter, Rafidain Bank ceased all payments to First City.

In November 1990, First City instituted this action to recover funds owing under the agreement. First City served a copy of the summons and complaint on both Rafidain Bank and Central Bank through the Iraq Permanent Representative to the United Nations. Defendants failed to appear or to answer the complaint, and a default judgment was accordingly entered on April 26, 1991. Defendants now seek relief from this judgment.

DISCUSSION

Rule 60(b) sets forth the grounds on which a court, in its discretion, may set aside a final judgment or order. It provides, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . . (4) the judgment is void.

While the grounds should be broadly construed to ensure justice, "final judgments should not 'be lightly reopened.' " *Nemaizer v. Baker,* 793 F.2d 58, 61 (2d Cir. 1986) (quoting

Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 401 (5th Cir. 1981)). As such, Rule 60(b) relief should be invoked "only upon a showing of exceptional circumstances." *Nemaizer*, 793 F.2d at 61.

Defendants raise three grounds in support of their motion for relief from the final judgment: i) that the judgment is void because service of process was not effected; ii) that the judgment is void as the Defendant are entitled to sovereign immunity; and iii) that the judgment may be set aside as the result of excusable neglect. As these grounds present different issues as to each Defendant, the grounds as to each Defendant will be addressed in turn.

A. Central Bank

Central Bank first contends that because service was not properly effected, the court lacked jurisdiction over it, rendering the judgment void.

Section 1608 of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.* (the "FSIA")[1] delineates the exclusive procedures for effecting service of process upon a foreign state. It cannot be contested that First City did not comply with any of these procedures in serving process upon Central Bank. No "special arrangement" for service existed between Central Bank and First City (§ 1608(b)(1));

1. FSIA, enacted in 1976, codified the doctrine of foreign sovereign immunity and set forth specific "standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States." H.R. Rep. No. 1487, 94th Cong., 2d Sess.

no delivery of the pleadings to any Central Bank agent were attempted (§ 1608(b)(2)); no international convention on service of documents applies here (§ 1608(b)(2)); and no letter of request, certified mailing to Central Bank in Baghdad, Iraq or other court order was received (§ 1608(b)(3)). Rather, First City delivered the pleadings to the Iraq Permanent Representative to the United Nations. However, as no special agreement allowing for such service was entered into between the parties, 28 U.S.C. § 1608(b)(1), service was ineffectual.[2] First City's failure to comply with the provisions of § 1608 is fatal to its claim. It is well settled that absent effective service, a court lacks jurisdiction over the defendant and all actions pertaining to such defendants, including the entry of default judgment, are void. *Texas Trading & Milling Corp. v. Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); *Gray v. Permanent Mission of People's Republic of Congo*, 443 F. Supp. 816, 821-22 (S.D.N.Y.), *aff'd*, 580 F.2d 1044 (2d Cir. 1978). *See also Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983); *40 D 6262 Rlty. Corp. v. United Arab Emirates, Etc.*, 447 F. Supp. 710, 712 (S.D.N.Y. 1978). The fact that Central Bank may have been aware of the lawsuit and the subsequent default judgment is of little import. "[I]nformal notification through channels clearly outside the obvious requirements of [FSIA] cannot be substituted for those which meet the requirements." *Gray*, 443 F. Supp. at 821.

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2. First City also failed to comply with § 1608(e), which provides that any default judgment "shall be sent to the foreign state or political division in the manner prescribed for service in this section. 28 U.S.C. § 1608(e).

Appendix G

Acknowledging that service of process was not made upon Central Bank in compliance with § 1608, First City attempts to salvage its opposition to this motion by arguing that Central Bank is the alter ego of Rafidain Bank, and as such, effective service upon Rafidain Bank should be deemed to constitute effective service upon Central Bank. The argument that where two entities function as one, service on one is effective as to both, is not without legal support. *See, e.g., Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398 (7th Cir. 1986); *I.A.M. Nat'l Pension Fund v. Wakefied Industries, Inc.*, 699 F.2d 1254, 1259 (D.C. Cir. 1983). However, here First City has failed to present sufficient evidence of unity of interest and ownership to support an alter ego claim. First City merely notes that two directors of Rafidain Bank were also directors of Central Bank. This alone is, as a matter of law, insufficient to overcome the presumption of independence given to corporate entities. *Lehigh Valley Industries, Inc. v. Birenbaum*, 527 F.2d 87, 94 (2d Cir. 1975); *Trafalgar Capital Corp. v. Oil Producers Equipment*, 5555 F. Supp. 305, 310 (S.D.N.Y. 1983). Absent more, Accordingly, we must presume Central Bank's independence and treat Central Bank and Rafidain Bank as separate entities. *Cf. First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 626-27, 103 S. Ct. 2591, 2600 (1983). *See also Minpeco, S.A. v. Hunt*, 686 F. Supp. 427, 431 (S.D.N.Y. 1988).

First City next suggests that strict compliance with § 1608 became unnecessary by virtue of President Bush's declaration on August 2, 1990, following the invasion of Kuwait by Iraq. President Bush declared that "the policies and the actions of the Government of Iraq constitute an

unusual and extraordinary threat to the national security and foreign policy of the United States," and invoked his authority under "the Constitution and laws of the United States" to block Iraq's assets in the United States. Executive Order 12, 722, 55 Fed. Reg. 31,803. First City suggests that under the President's declaration, Iraq was stripped of all privileges, including various privileges contained in FSIA. In support of its argument, First City cites *New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co.*, 502 F. Supp. 120 (S.D.N.Y. 1980), in which Judge Duffy held that a similar order declared by President Carter in response to the Iranian hostage crisis effected a suspension of Iranian immunity from prejudgment attachment in the United States. While this case is relevant, it is not dispositive.

Accordingly, the default judgment against Central Bank is vacated. We note that until proper service is effected, this Court has no jurisdiction over Central Bank. However, as we may grant Central Bank relief "upon such terms as are just," Fed. R. Civ. P. 60(b), we will not dismiss this action, and instead allow First City a reasonable time to effectively serve process. *Haley v. Simmons*, 529 F.2d 78, 79 (8th Cir. 1976) (court may dismiss or allow further attempts at service); *Leab v. Streit*, 584 F. Supp. 748, 762 (S.D.N.Y. 1984) (same); *Davis v. Gahan*, 227 F. Supp. 867 (S.D.N.Y. 1964) (same).

B. Rafidain

Rafidain Bank similarly contends that it was improperly served, rendering the judgment void. The argument is patently without merit. Section 1608(b)(1) provides that service of

process upon an agency or instrumentality of a foreign state may be made "by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality." 28 U.S.C. § 1608(b)(1).

Here, the agreement between Rafidain Bank and First City expressly provided that service of process could be effected by service on the Iraq Permanent Representative to the United Nations.[3] As such, First City's service in this manner was effective as a service made in accordance with a "special arrangement."

Rafidain next argues that, as a foreign state, it enjoys immunity from suit and as such, any default judgment against it is void. *Cf. Yugoexport, Inc. v. Thai Airways Int'l, Ltd.*, 749 F.2d 1373, 1375 (9th Cir. 1984), *cert. denied*, 471 U.S. 1101, 105 S. Ct. 2326 (1985); *Gray*, 443 F. Supp. at 821-822. The argument is easily dismissed. The principal transaction giving rise to this lawsuit was a $50 million loan agreement between Rafidain Bank and First City. The FSIA specifically provides an exception to sovereign immunity where the suit is based upon the foreign state's commercial

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3. Specifically, ¶ 6 of the Agreement provides:

> [T]he Borrower consents to process being served in any suit, legal action or proceeding in the New York and federal courts sitting in New York, New York, by serving a copy thereof (by registered mail, postage prepaid) upon the Permanent Representative of Iraq to the United Nations. . . .

activity. 28 U.S.C. § 1605(a)(2).[4] Here, Rafidain Bank's actions were purely commercial in nature. As such, it cannot claim sovereign immunity for its acts. *Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160 (1992) (when a foreign government or one of its instrumentalities acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are commercial and the foreign sovereign is not entitled to immunity).

Lastly, Rafidain contends that relief from judgment is proper in that its failure to appear was the result of "excusable neglect." In determining whether relief pursuant to the "excusable neglect" language of Rule 60(b)(1) is warranted, courts are to consider i) whether the default was willful; ii) whether defendant has a meritorious defense; and iii) the level of prejudice that may occur to the non-defaulting party if relief is granted. *Davis v. Musler,* 713 F.2d 907, 915 (2d Cir. 1983); *United Bank of Kuwait, PLC v. Enventure Energy Enhanced Oil Recovery Assocs.*, 755 F. Supp. 1195, 1205 (S.D.N.Y. 1989).

Under the first criterion, Rafidain urges the Court to consider the state of affairs Rafidain Bank found itself in

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4. This section provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in an case. . . . (2) in which the actions is based upon a commercial activity carried on in the United States by the foreign state;, or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere. . . . 28 U.S.C. § 1605.

1991. Rafidain Bank points out that less than a month after the amended complaint was filed, the United States went to war with the Republic of Iraq. At the time Rafidain Bank's response to the amended complaint was due, the city of Baghdad, Iraq had undergone massive destruction from Allied forces, making communication difficult if not impossible. These claims of inability to communicate, however, are belied by evidence that Rafidain Bank maintained communication with counsel in London and at least one attorney in New York during this period. As such, its excuse of inability to communicate is unavailing.

Nor has Rafidain proffered a meritorious defense in its behalf. Indeed, Rafidain does not dispute that it entered into the loan agreement with First City, that First City honored the drafts drawn on the letters of credit, that Rafidain failed to make payments on its loan, or that the amount of the principal and interest determined in the default judgment was correct. Rather, Rafidain asserts as its sole defense its inability to obtain foreign exchange due to the effect of war. The argument that contractual obligations may be suspended in times of war is not without legal support. *See, e.g., Sutherland v. Mayer,* 46 S. Ct. 538, 540, 271 U.S. 272 (1926); *Zimmerman v. Hicks*, 7 F.2d 443, 445 (2d Cir. 1925), *aff'd*, 274 U.S. 253, 47 S. Ct. 625 (1927). However, the defense in inapplicable here where payments were not resumed following the cessation of war. Furthermore, as actions of the Iraq Government are also the actions of its entities, Rafidain Bank lacks the freedom from misconduct necessary under an impracticability defense. As such, Rafidain's argument of impracticability are carry little weight.

Lastly, it is clear that First City would be prejudiced should the judgment be set aside. Rafidain's motion for relief from that judgment comes two days short of a year after the judgment was entered. During that interim period, the First City officers and employees who negotiated and signed the loan agreement with Rafidain have left First City. Furthermore, the London branch which held the Rafidain Bank accounts at issue in Count II of the Complaint has been closed. As such, it is clear that reopening the judgment would "result in the loss of evidence, create increased difficulties of discovery." C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil*, § 2699 at 536-37 (quoted in *David*, 713 F.2d at 916. While we do not believe this prejudice is overwhelming, we conclude that it is sufficiently burdensome to tip the scales against setting aside the judgment.

Considering these factors together, it is clear that Rafidain Bank has failed to establish the "exception circumstances" warranting relief from the default judgment. *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986); *House v. Secretary of Health and Human Services*, 688 F.2d 7, 9 (2d Cir. 1982). Accordingly, its motion for relief is denied.

SO ORDERED.

s/ John S. Martin, Jr.
John S. Martin, Jr., U.S.D.J.

Dated: September 28, 1992

APPENDIX H — DEFAULT JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 22, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 7360 (JSM)

FIRST CITY, TEXAS-HOUSTON, N.A.

Plaintiff,

- against -

RAFIDAIN BANK and CENTRAL BANK OF IRAQ,

Defendants.

DEFAULT JUDGMENT

This action having been commenced on November 15, 1990 by the filing of the Complaint; a copy of the Summons and Complaint having been served upon the defendants Rafidain Bank and Central Bank of Iraq on November 15, 1990 by registered mail, return receipt requested addressed c/o Permanent Representative of Iraq to the United Nations, Iraq Mission, 14 East 79th Street, New York, New York 10021, the method of service agreed upon by the parties in paragraph 6 of their contract; the Amended Complaint having been filed on December 18, 1990; a copy of the Amended Complaint having been served upon defendants Rafidain Bank and Central Bank of Iraq on December 18, 1990 by

registered mail, return receipt requested at the address noted above; the Summons and proofs of service having been filed on December 19, 1990; the defendants not having answered the Complaint or Amended Complaint; and the time for answering the Complaint and Amended Complaint having expired, it is, pursuant to Rule 55(b)(2), F. R. Civ. P., and 28 U.S.C. § 1608(e).

ORDERED, ADJUDGED AND DECREED that the plaintiff First City have judgment (i) against defendant Rafidain Bank in the amount of $49,952,215.10, plus interest from August 2, 1990 to March 31, 1991 of $3,212,812.40, totalling $53,165,027.50, plus costs of $120, plus statutory fee of $20, for a total of $53,165,167.50, and (ii) against defendants Rafidain Bank and Central Bank of Iraq declaring that plaintiff was entitled to set off the $21,398,797.92 in funds it held of defendants against the amount Rafidain Bank owed it.

FURTHER ORDERED, ADJUDGED AND DECREED (i) that First City shall send a copy of this Default Judgment to defendants in the manner in which it has previously served them with process in this case, and (ii) that First City shall not execute upon the monetary damages portion of this Default Judgment to the extent such execution would involve levying on property of defendants subject to U.S. Treasury Department Iraqi Sanctions Regulations now in effect, while in effect, without further order of this Court.

Dated: New York, New York
April 22, 1991

s/ [illegible]
U.S.D.J.

APPENDIX I — SUBPOENA IN A CIVIL CASE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JUNE 23, 2000

[omitted here but submitted separately as Lodging]

APPENDIX J — SUBPOENA IN A CIVIL CASE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED SEPTEMBER 14, 1998

[omitted here but submitted separately as Lodging]

Supreme Court, U.S.
FILED
JUN 7 2002
CLERK

(2)

No. 01-1626

In the

Supreme Court of the United States

RAFIDAIN BANK,

Petitioner,

v.

FIRST CITY, TEXAS-HOUSTON, N.A.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

J.P. Morgan Chase Bank, successor to the interest of First City, Texas-Houston, N.A. in this litigation, pursuant to Supreme Court Rule 29.6, states that its parent corporation is J.P. Morgan Chase & Company. Its recent former parents were Chase Manhattan Corporation, and Chemical Banking Corporation. All three of these entities have issued shares to the public.

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STATEMENT OF THE CASE

The Court of Appeals for the Second Circuit accurately summarized the facts pertaining to the appeal. (Pet. Appendix A - App. 3a-8a.[1]) In light of Petitioner's Statement of the Case, however, First City, Texas-Houston, N.A. ("First City") submits this statement to clarify the facts relevant to this petition.

The Underlying Lawsuit

In 1990, First City sued Rafidain Bank ("Rafidain") for default on Rafidain's loan obligations to First City. (App. 3a.) The lawsuit followed Iraq's repudiation of its foreign debts after its invasion of Kuwait. (App. 43a.) First City also sued the Central Bank of Iraq ("Central Bank") as the alter ego of Rafidain. (App. 3a.) In 1991, First City obtained a $53.2 million default judgment against both banks, but the judgment against the Central Bank was later vacated for insufficient personal service. (*Id.*)[2] After re-serving the Central Bank, First City sought to establish its alter ego claim to enforce its judgment against Rafidain and collect from both Rafidain and the Central Bank. (*Id.*) Accordingly, First City served discovery requests on both Rafidain and the Central Bank. (*Id.*)

The Prior Proceedings

The first appeal in this case was from the District Court's 1997 dismissal of the Central Bank on the

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[1] Petitioner's Appendix shall be cited herein as "App. __a."

[2] The Default Judgment dated April 22, 1991, is contained in Petitioner's Appendix as Appendix H, App. 67a-68a.

grounds of sovereign immunity. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172 (2d Cir. 1998). (App. 42a-55a.) In reversing that dismissal, the Second Circuit held that First City should have been allowed discovery into its claim that the Central Bank was the alter ego of Rafidain. (150 F.3d at 177; App. 52a.) The Circuit Court held that further discovery on Rafidain would not intrude upon sovereign immunity because Rafidain, "has been found to fit within the FSIA's 'commercial activity' exception and because First City has a judgment against Rafidain." (150 F.3d at 177; App. 52a.) The Circuit Court instructed the District Court to permit First City to conduct full discovery against Rafidain. (*Id.*)

Shortly thereafter, First City served a subpoena upon Rafidain by serving Iraq's Permanent Representative to the United Nations in New York, Rafidain's designated agent, as permitted by the loan documents and federal rules, and mailing a copy to Rafidain's counsel of record. (App. 31a-32a.) This is the subpoena referred to as the "1998 Subpoena." (Pet. Lodging at L-4.) When Rafidain refused to comply with the subpoena, First City moved to hold it in contempt. On November 19, 1998, the District Court entered an Order to Show Cause against Rafidain, and one year later, on November 1, 1999 held Rafidain in civil contempt. (App. 36a-41a.)

On June 21, 2000, seven and a half months after the Contempt Order, Rafidain moved to vacate the Order on the grounds that the District Court lacked subject matter jurisdiction and personal jurisdiction. (App. 6a.) First City served additional post-judgment discovery on Rafidain's new lawyer pursuant to Federal Rule 69. (*Id.*) Rafidain's motion to quash this discovery was denied, as was its motion for a stay, and Rafidain withdrew its appeal from that ruling in its opening brief in the appel-

late court. (*Id.*) On November 8, 2000, the District Court denied Rafidain's motion to vacate the Contempt Order. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250, 255 (S.D. N.Y. 2000). (App. 23a-35a.) On February 7, 2002, the Second Circuit affirmed the District Court's decision, and it is that ruling that is the subject of the Petition. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d 48 (2d Cir. 2002). (App. 1a-15a.)

The Second Circuit Decision

The Second Circuit expressly did not decide whether Rafidain was a "party" to the lawsuit when the subpoena was issued, stating, "[w]e affirm, without deciding whether Rafidain is or has been a 'party,' on the ground that because jurisdiction under the FSIA existed to decide the underlying litigation involving a loan agreement and letters of credit, the FSIA continues to confer jurisdiction for proceedings in aid of that money judgment." (281 F.3d at 49; App. 2a.) The Circuit Court held that Rafidain had submitted itself to the jurisdiction of the United States courts by virtue of its commercial banking transactions in the United States. (281 F.3d at 53; App. 11a.) Rafidain does not contest this finding. (*Id.*)

The Circuit Court also held that the waiver of sovereign immunity under the "commercial activities" exception, "is broad enough to sustain the court's jurisdiction through proceedings to aid collection of a money judgment rendered in the case, including discovery pertaining to the judgment debtor's assets." (281 F.3d at 53-54; App. 12a.) And, the Court held that where subject matter jurisdiction exists under the FSIA, "jurisdiction continues long enough to allow proceedings in aid of a money judgment that is rendered in the case." (*Id.*) The affirmance

on this point was bolstered by the Second Circuit's factual finding that the 1998 Subpoena "does seek production of evidence calculated to aid First City's collection on the money judgment entered against Rafidain." (281 F.3d at 54, n.3; App. 12a, n.3, citing the 1998 Subpoena, App. L-4.)

Thus, to challenge the Second Circuit's decision on subject matter jurisdiction, Petitioner must either challenge the legal proposition that jurisdiction over a sovereign for purposes of a lawsuit encompasses post-judgment discovery, or the finding that the subpoena was in aid of collecting a money judgment. Neither of these issues is raised by Petitioner's "Questions Presented."

The Second Circuit also affirmed the District Court's finding of personal jurisdiction over Rafidain, based on (a) Rafidain's waiver of any objection to the manner of service; (b) Rafidain's acknowledgment that it had actual notice of the 1998 Subpoena; and (c) a fact finding that First City effected service of the subpoena on Rafidain (by serving the Permanent Representative of Iraq to the United Nations at the Iraq Mission) in accordance with the contractual arrangement for service contained in the loan agreement between First City and Rafidain. (281 F.3d at 54-55; App. 14a-15a.) Rafidain does not contest the first two of these bases. Instead, it tries to argue against the fact finding in the third, urging that the service was inconsistent with the parties' contract.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Second Circuit affirmed the District Court on the ground that the court's jurisdiction extended to proceedings in aid of a money judgment. The Circuit Court expressly did not decide whether Petitioner remained a "party" to the lawsuit or whether the FSIA would allow discovery against a non-party. Accordingly, none of the three questions upon which Petitioner seeks review is properly raised by this case. Petitioner does not contend that the Circuit Court decision is in conflict with the decision of any other circuit or of any state court of last resort. The only issue that Petitioner contends is an important question of first impression, relating to discovery from non-party foreign states, was not even decided by the Second Circuit. Thus, there is no compelling reason why the Petition should be granted.

Petitioner is really seeking an additional appellate review of the two issues decided by the courts below: (1) whether the subpoena was "in aid of a money judgment;" and (2) whether service of the subpoena on Rafidain was in accordance with the contractual arrangements for service in the loan agreement. These are not the kind of fact findings this Court should review.

I. The Undisputed Subject Matter Jurisdiction Over Rafidain Extends To Matters In Aid Of Enforcement Of A Monetary Judgment.

The first two questions presented by Petitioner concern subject matter jurisdiction. Petitioner contends that the Foreign Sovereign Immunity Act, 28 U.S.C. § 1602-1611, does not "create an exception" to immunity for non-party discovery against a foreign state. Petitioner further con-

tends that 28 U.S.C. § 1330(a) does not confer subject matter jurisdiction on a foreign state where "the foreign state or agency is not a party to the action." (Pet. at i.) However, these questions ignore the basis upon which the Second Circuit affirmed the Contempt Order. That Order was affirmed because the District Court's subject matter jurisdiction over First City's claims against Rafidain was undisputed, and because such jurisdiction extends to matters in aid of enforcement of the money judgment against Rafidain.

It is uncontested that the District Court had subject matter jurisdiction over First City's claims against Rafidain. While foreign states and their agencies generally enjoy sovereign immunity pursuant to 28 U.S.C. § 1604, there is an exception for "commercial activities" by such entities. 28 U.S.C. § 1605 provides that:

> (a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States *in any case*—
>
> * * *
>
> (2) in which *the action* is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere . . . .

(Emphasis added.) Rafidain does not dispute that it participated in commercial banking transactions in the United States, or that the First City action was based on such transactions, specifically the parties' loan agreements. (App. 11a.) *See, Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (subject matter jurisdiction over Argentine central bank's issuance of bonds and rescheduling of bond payments). Here, there is clearly a

"case" against Rafidain, and "the action" is based on Rafidain's commercial activity.

The Second Circuit did not address, and this Court need not consider, whether Rafidain was still a "party" to the lawsuit when the 1998 Subpoena was served. Although Petitioner seeks to frame the questions for review in terms of jurisdiction over a non-party, the Second Circuit correctly held that, "[T]he waiver by a foreign state under section 1605(a)(2) [quoted above], rendering it a party to an action, is broad enough to sustain the court's jurisdiction through proceedings to aid collection of a money judgment rendered in the case, including discovery pertaining to the judgment debtor's assets." (281 F.3d at 53-54; App. 12a.) *See*, *Peacock v. Thomas*, 516 U.S. 349, 356 (1996) ("Without jurisdiction to enforce a judgment entered by a federal court, 'the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.'" Quoting *Riggs v. Johnson County*, 6 Wall. 166, 187, 18 L. Ed. 768 (1868).

In the Second Circuit, Petitioner conceded that it was subject to the court's continuing jurisdiction in aid of enforcement of the judgment. In its brief on appeal, Petitioner stated, "[t]here is no dispute, of course, that Rafidain is a judgment debtor and, as such, is subject to the jurisdiction of the district court for purposes of asset discovery in aid of execution under Fed. R. Civ. P. 69(a)." (Rafidain Br. in 2nd Cir. at 4.) Thus, Petitioner admits that the court retains subject matter jurisdiction to enforce the judgment. Although Petitioner argues that the 1998 Subpoena was not in furtherance of post-judgment collection efforts, the appellate court expressly disagreed. It found, as a factual matter, that the 1998 Subpoena sought production of evidence "calculated to aid First

City's collection on the money judgment entered against Rafidain." (281 F.3d at 54 and n.3; App. 12a.) "In this case," the Second Circuit stated, "that includes discovery regarding a possible alter ego of Rafidain that may have assets sufficient to satisfy First City's judgment." (App. 12a; and similar statement at 9a.) This Court should not reverse the lower court's fact finding.[3]

II. The Lower Courts' Fact Determinations On Service And Personal Jurisdiction Should Not Be Disturbed.

Petitioner raises the issue of personal jurisdiction, arguing that there could be no contempt if the District Court did not have personal jurisdiction over Rafidain at the time it entered the Contempt Order. The court's personal jurisdiction over Rafidain stemmed both from the original personal jurisdiction for the case, extended to enforcement proceedings as discussed above, and from service of the 1998 Subpoena on Rafidain.

There is no dispute regarding service of the initial summons and complaint. Rafidain's motion to vacate the 1991 default judgment was denied, and Rafidain did not appeal that order. (Pet. at 5; *First City, Texas-Houston, N.A. v. Rafidain Bank*, *supra*, 197 F.R.D. at 252; App. 25a.) 28 U.S.C. § 1330(b) specifically states that, "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) [subject matter juris-

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[3] As the Second Circuit noted, Petitioner's complaint is really with the discretion exercised by the District Court as to what discovery to allow, not with subject matter jurisdiction. (281 F.3d at 54; App. 12a.)

diction] where service has been made under section 1608 of this title [by special arrangement]." See, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 435 n.3 (1989). Thus, the court had personal jurisdiction over Rafidain in this case beginning in 1990. (App. 67a-68a.)

Both the District Court and the Court of Appeals found that service of the 1998 Subpoena was sufficient to confer personal jurisdiction over Rafidain. The Second Circuit affirmed personal jurisdiction over Rafidain on each of the three independent bases decided by the District Court. The Circuit Court held that Rafidain waived any objection to the manner of service of the subpoena, "because it does not claim lack of actual notice, yet it failed to appear or challenge the contempt order or service of the subpoena until more than eleven months after the contempt order was entered and twenty-one months after the subpoena had been served." (281 F.3d at 55; App. 14a.) The District Court refused to vacate the Contempt Order on this same basis. (197 F.R.D. at 254; App. 30a.) In framing its final question presented, Petitioner concedes that it "received actual notice of the subpoena." (Pet. Questions Presented, Pet. at i.)

Personal jurisdiction is a defense that can be waived. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703-704 (1982) (personal jurisdiction can be waived); *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939) (jurisdiction defense "may be lost by failure to assert it seasonably"). Here, Petitioner concedes actual notice of the subpoena, but did nothing to challenge personal service for more than a year and a half. Petitioner's belated attempt to object to service did not come until it sought to vacate the Contempt Order, almost a year after that

order was entered. The District Court held that Petitioner had waived that objection. This Court should not disturb that finding.

The Second Circuit also affirmed because, aside from waiver and actual notice, the service of the 1998 Subpoena complied with the "special arrangement for service" contained in the loan documents. (281 F.3d at 55; App. 14a-15a.) The District Court examined the actual means of service of the 1998 Subpoena and made a factual determination that such service complied with the provisions of the loan agreement between First City and Rafidain. (197 F.R.D. at 255; App. 31a-32a.) The loan agreement appointed the Iraqi Permanent Representative in New York as its agent to accept service. (*Id.*) First City served that agent by delivering a copy of the subpoena to the Iraqi Mission and mailing a copy to Rafidain's counsel. (197 F.R.D. at 255; App. 32a.) The District Court held that this satisfied the requirements of both the Federal Rules of Civil Procedure and the loan agreement—the special arrangement for service agreed to by the parties. The Second Circuit affirmed that holding. This Court should not grant certiorari to review the factual determination of whether the service of a subpoena comported with a contractual agreement for service.

CONCLUSION

This Court should not grant certiorari here because there is no compelling reason to do so. There is no conflict between the Circuits, or any other courts, on any of the issues raised by Petitioner. None of the questions presented by Petitioner were even decided by the appellate court, and resolution of those issues would not change the outcome of this case. There is no important question of first impression.

The Petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

RAFIDAIN BANK,

Petitioner,

v.

FIRST CITY, TEXAS-HOUSTON, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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In this action, the extraordinary imposition of the civil contempt power by the district court against a foreign state was based solely on a determination made by the Second Circuit that Petitioner was still a "party" to this action, notwithstanding the fact that a final judgment on default had been entered against Petitioner seven years earlier. *First City, Texas-Houston, N.A. v. Rafidain Bank and Central Bank of Iraq*, 150 F.3d 172 (2d Cir. 1998) ("First City I"); App. at 42a. In light of this history, for the Respondent to argue that this Court "need not consider, whether [Petitioner] was still a 'party' to the lawsuit when the 1998 Subpoena was served" borders on the frivolous.

It is uncontested that both the district court's initial order holding Petitioner in contempt, and the district court's subsequent order denying Petitioner's motion to vacate the contempt order, which is the subject of this Petition, were premised solely and entirely on the Second Circuit's finding that Petitioner was still a "party" to this action. As the district court clearly stated in its Opinion and Order dated November 8, 2000, denying Petitioner's motion to vacate:

> In moving to vacate the Court's order of November 1, 1999 holding Rafidain in civil contempt for failure to comply with the 1998 Rafidain Subpoena, Rafidain argues, first and foremost, that the Court lacked authority to impose such an order because Rafidain by that time was no longer a party to this lawsuit and was exempt under the FSIA from being subject to third-party discovery. The first premise of the argument is effectively foreclosed, however, by the Court of Appeals' express finding that "Rafidain is a party to this suit" and that "the district court is instructed to permit First

> City to conduct full discovery against Rafidain." *First City*, 150 F.3d at 177. While Rafidain was not a party to the appeal in which the Court of Appeals made these determinations and therefore may have a basis in some future appeal for asking the Court of Appeals to reconsider its conclusions in this regard, it would exceed the power of this lower court to disregard these clear and unequivocal determinations of the Court of Appeals. The Court therefore finds, in compliance with the Second Circuit's ruling, that Rafidain remains a party to this action.

First City, Texas-Houston, N.A. v. Rafidain Bank, 197 F.R.D. 250 (S.D.N.Y. 2000); App. at 29a.[1]

The district court's ruling that Petitioner remained a "party" to the litigation was essential to its exercise of subject matter jurisdiction to enforce the subpoena, because the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 ("FSIA"), does not provide for non-party discovery against foreign states or their instrumentalities. Moreover, the jurisdictional statute itself, 28 U.S.C. § 1330(a), limits the subject matter jurisdiction of the district courts over foreign states to "claims for relief in personam" pending against the

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1. The Second Circuit's ruling that Petitioner was a "party" to this action was also critical to the district court's determination that it had obtained personal jurisdiction over Petitioner by virtue of the service of a copy of the subpoena upon the attorneys who had previously represented Petitioner in the litigation. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250; App. at 31a ("Service of the 1998 Rafidain Subpoena — which, among other things, was served on the only law firm that had ever appeared for [Petitioner] up to that time . . . more than met the requirements of *service on a party*.") (emphasis added).

foreign state. There are no such claims currently pending in this litigation against Petitioner, and have not been since 1991. Thus, as the district court itself aptly stated in its Memorandum Order granting Petitioner's motion for a stay pending appeal:

> [I]t is undisputed that the subpoena is valid *only if Rafidain is still a party* to the ongoing case against Central Bank of Iraq . . .

First City, Texas-Houston, N.A. v. Rafidain Bank, 131 F. Supp. 2d 540 (S.D.N.Y. 2001) (emphasis added); App. at 18a-19a.

In its second bite at the apple, the Second Circuit attempted (*sua sponte*) to abandon its original rationale, and upheld the district court's jurisdiction on a totally new ground, never advanced by Respondent or addressed by the parties, namely, that the 1998 Subpoena was not a discovery subpoena issued pursuant to its instruction to permit "full discovery" against Petitioner, but rather an asset identification subpoena in aid of enforcement of Respondent's judgment against Petitioner. However, in this Petition, Petitioner asks this Court to see the Second Circuit's second decision for what it really is — a *post hoc* rationalization intended to justify and salvage an earlier decision which was jurisdictionally erroneous and which the Court recognized could not be sustained on its original grounds.

We respectfully submit that, based upon this troubling record, this Court should grant certiorari for two separate but equally important reasons: first, because the legal bases contrived by the Second Circuit to mitigate the error in its original decision makes bad law on two significant issues concerning the subject matter jurisdiction and personal jurisdiction of the district court over foreign states; and

second, because, as the court of last resort of the United States of America, this Court has a particular responsibility to see that foreign states — including unpopular foreign states such as Petitioner — are treated fairly by the American judicial system, and with the comity and respect to which they are entitled as independent sovereign nations.

A. The 1998 Subpoena Was Not An Asset Subpoena

The principal argument asserted by Respondent in opposition to this Petition is that the issue of whether the Second Circuit properly characterized the 1998 Subpoena as an information subpoena in aid of a money judgement "is not the kind of fact finding [] this Court should review." Respondent's Brief in Opposition at p. 5. When then, one may fairly inquire, *was* the appropriate occasion for Petitioner to address this issue? Since no participant in these proceedings — not the district court; not the Second Circuit; and certainly not the Respondent itself — ever sought to justify the district court's subject matter jurisdiction on the ground that the 1998 Subpoena was really an asset identification subpoena, until the Second Circuit issued its second decision in this matter, the Petitioner has never had a reason or opportunity to address this issue before now. Understandably, all of Petitioner's arguments before the Second Circuit addressed the grounds stated by the district court for its decision, namely, that in accordance with *First City I*, Petitioner is a party to this action. Thus, to preclude Petitioner from contesting the issue now, before this Court of last resort, would be tantamount to denying Petitioner any opportunity to contest the sole ground upon which the finding of contempt and imposition of sanctions has now been upheld.

It is undisputed that, at the time Respondent served the 1998 Subpoena, Respondent itself claimed that the 1998 Subpoena sought only "jurisdictional discovery" for use in opposing the motion of the sole surviving party, Central Bank of Iraq ("Central Bank") to dismiss on grounds of sovereign immunity and lack of subject matter jurisdiction. Thus, for example, in its brief before the Second Circuit, Respondent characterized the 1998 Subpoena as follows:

> [Petitioner's] refusal to comply with First City's requests for jurisdictional discovery dates back to 1995 and continues to this day, despite this Court's 1998 Opinion. That Opinion reversed the 1997 dismissal of this case and remanded it to give First City an opportunity to conduct discovery that this Court held had been cut off prematurely. This Court expressly determined that [Petitioner} should first provide First City with jurisdictional discovery.

Brief for Plaintiff-Appellant First City, Texas-Houston, N.A., dated May 10, 2001, at 1 (citations omitted). Similarly, at pages 5 and 6 of the same brief, Respondent wrote:

> On September 14, 1998, First City served Rafidain with a subpoena duces tecum seeking jurisdictional discovery (the "1998 Subpoena"). . . . Rafidain chose to ignore the subpoena. First City moved to hold Rafidian in contempt for its failure to respond to First City's September 1998 subpoena . . . First City also moved to compel Central Bank to respond to discovery . . . Having unsuccessfully sought to procure jurisdictional discovery against Rafidain, First City argued that it was entitled to at least some further discovery from Central Bank . . .

Id. at pp. 5 and 6.

It is clear, moreover, that Respondent fully understands and appreciates the difference between an ordinary discovery subpoena, such as the 1998 Subpoena, and an information subpoena in aid of execution of a judgement, since it separately served both kinds of subpoenas on Petitioner. Indeed, the distinction was clearly drawn by Respondent in its own characterization of the two subpoenas in its brief to the district court in opposition to Petitioner's motion for a stay pending appeal. As Respondent then wrote:

> Rafidain's request that it not be required to respond to the 1998 subpoena, which seeks the discovery the Second Circuit directed to go forward [*i.e.*, "full discovery"], and the 2000 Rafidain Subpoena, which seeks post-judgment asset discovery, pending its appeal of the Court's Orders is unjustifiable.

First City, Texas-Houston's Brief in Opposition, dated February 2, 2001, at p. 7. Thus, in Respondent's own words, the 2000 Subpoena was an asset discovery subpoena; the 1998 Subpoena was not.

Although Petitioner appreciates the fact that drawing such distinctions between the scope and nature of two subpoenas may not be the usual grist of this Honorable Court's docket, we respectfully submit that, in this extraordinary case, this Court cannot do justice, and fairly consider Petitioner's arguments, unless it is prepared to look behind the Second Circuit's self-serving re-characterization of the 1998 Subpoena, to view the true facts and issues presented by this Petition. If, as Petitioner contends, and as the district court itself articulated when it held Petitioner in contempt, the 1998 Subpoena was a discovery subpoena, served in accordance with the Second Circuit's direction to

permit "full discovery" against Petitioner for the purpose of establishing jurisdiction over Respondent's claim against Central Bank, then the district court's subject matter jurisdiction to enforce the subpoena against Petitioner can only be upheld if either: (i) Petitioner was still a party to this action, as the district court, following the Second Circuit, felt itself constrained to hold; or (ii) if the FSIA and 28 U.S.C. § 1330(a) grant the district court subject matter jurisdiction to permit "full discovery" against foreign states who are not parties to a current action.

Since both the Second Circuit and Respondent have abandoned the position that Petitioner is a party to this action, the district court's subject matter jurisdiction can only be upheld on the second ground, *i.e.*, that the district court may assert subject matter jurisdiction to compel non-party discovery against foreign states. As discussed in the Petition, this is an issue of first impression in the courts of the United States, and the Second Circuit's decision, if permitted to stand, would make bad law which would violate both the express limitations on the district court's subject matter jurisdiction established by Congress in 28 U.S.C. § 1330, as well as long accepted principles of international law. Accordingly, the Petition should be granted on the first two questions presented in the Petition.

B. "Actual Notice" Is Not Sufficient To Uphold Personal Jurisdiction If Service is Not Accomplished In Accordance With the Parties' "Special Arrangement"

Respondent is correct that there is no factual dispute concerning the method of service attempted by Respondent with respect to the 1998 Subpoena. Service was attempted in clear violation of the parties' "special arrangement," which required service by registered mail. Instead, Respondent sent

a process server to knock on the door of the Iraqi Mission to the United Nations, with predictable results. Service was not accepted, and a confrontation ensued between the process server and some unnamed person at the Mission.

Notwithstanding Respondent's failure to serve the subpoena in accordance with the parties' agreement, both the district court and the Second Circuit found that service was accomplished because Petitioner received "actual notice" of the subpoena, essentially by "nail and mail." [2] Contrary to Respondent's curious argument, however, this holding raises a significant issue of law, not fact, concerning the applicability of the "actual notice" rule to service of process on foreign states governed by Section 1608(b)(1) of the FSIA, *i.e.*, where, as here, the parties have agreed to a specific "special arrangement" for service of process.

For the reasons discussed in the Petition, the Second Circuit's application of the "actual notice" rule to service

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2. Significantly, the district court's decision finding service to have been sufficient specifically relied upon the Second Circuit's ruling that Petitioner was a party to the action, stating:

> As a party, Rafidain was subject to providing such discovery pursuant to Rules 26 though 37 of the Federal Rules of Civil Procedure. Service of the 1998 Rafidain Subpoena — which, among other things, — was served on the only law firm that had ever appeared for Rafidain up to that time . . . more then met the requirements for service on a party.

First City, Texas-Houston, N.A. v. Rafidain Bank, 197 F.R.D. 250; App. at 31a. It is thus highly questionable whether the district court itself would have upheld Respondent's method of service if it had not been constrained by the Second Circuit's finding, now implicitly revoked, that Petitioner is a "party" to the action.

governed by Section 1608(b)(1) is without precedent, and would seriously undermine the Congressional intent behind section 1608(b)(1), which was to "minimize the potential irritants to relations with foreign states" by encouraging foreign states to negotiate an agreed-upon method of service. H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976). Nothing could be more calculated to subvert, rather then encourage, the willingness of foreign states to negotiate such "special arrangements," as well as to heighten suspicions of partisanship and bias, then the courts' failure to enforce such agreements as written, whether or not "actual notice' is received by some other method of service.

CONCLUSION

Respondent's arguments against granting the Petition continue a disturbing pattern.

First, the district court declined even to consider Petitioner's jurisdictional arguments in support of its motion to vacate the contempt order, on the ground that it was foreclosed by the Second Circuit's finding that Petitioner is a party, despite the fact that Petitioner was not a participant in the appeal in which this issue was raised (and decided) solely by the appellate court. The issue of the district court's subject matter jurisdiction to enforce the subpoena was never briefed or argued before the Second Circuit by any party.

Next, the Second Circuit, backpedaling from its initial decision, upheld the contempt order against Petitioner on a new ground, not only entirely different from the ground upon which the district court acted, but moreover a ground (once again) never advanced by Respondent, and which Petitioner consequently had no opportunity or occasion to address.

Now, Respondent comes before this Court and argues that this Court should not grant certiorari to hear Petitioner's arguments in opposition to the Second Circuit's new decision, because the Second Circuit's decision is based upon supposed findings of fact, not law, even though said purported "findings" were made by the Second Circuit *sua sponte*, without affording Petitioner any opportunity to address or rebut them in advance of the Court's issuing its decision.

There is something radically wrong with the procedural history described above. It is true that Petitioner originally ignored the subpoena, and failed to contest the entry of the contempt order, before moving to vacate. But, as the district court properly observed, that is an accepted and legitimate manner in which a party may proceed to challenge the court's jurisdiction.

What is not legitimate, and, we submit, requires serious review by this Honorable Court, is the Petitioner's treatment at the hands of the Second Circuit, which has twice decided issues against the Petitioner, leading to the extraordinary imposition of contempt and sanctions against a foreign state, without ever permitting Petitioner the opportunity to address the grounds upon which the Second Circuit made its rulings.

In a very real sense, Petitioner has been deprived of the due process of law, not to mention fundamental fairness, by the actions of the federal courts below. Such roughshod treatment of an independent foreign nation should not be allowed to stand.

The questions raised in the Petition concerning the subject matter jurisdiction and personal jurisdiction of the districts courts to compel discovery against non-party foreign states are real and substantial, and could have a broad impact upon litigation against foreign states in the federal courts.

For both of these reasons, the Petition should be granted.

Respectfully submitted,

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